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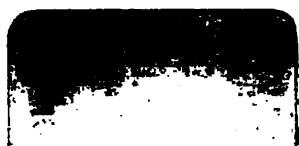
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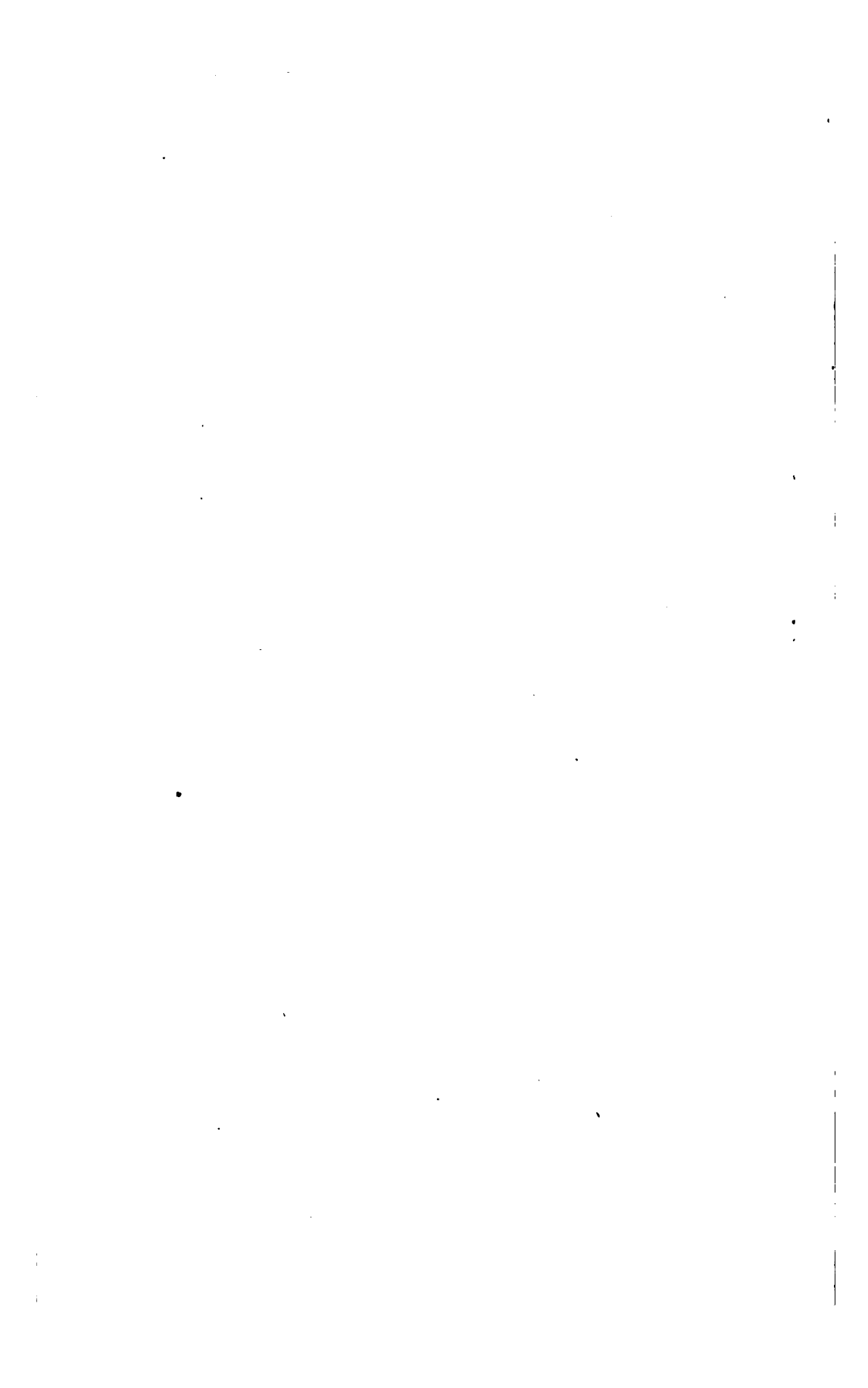
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THE LAW OF CONTRACTS

THE
LAW OF CONTRACTS

BY

CLARENCE D. ASHLEY

**PROFESSOR OF LAW AND DEAN OF THE FACULTY OF LAW
IN NEW YORK UNIVERSITY**

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TO
MY COLLEGE CLASSMATE AND FRIEND OF
MANY YEARS
FREDERICK SHELDON PARKER
THIS BOOK IS AFFECTIONATELY DEDICATED

PREFACE

UPON the important subject of contract the law is still far from being fully developed. Many of its rules are crude and unscientific, while numerous questions remain unsettled. Technical requirements, such as the accidental and unnecessary doctrine of consideration, are likely to disappear, bringing the law in accord with the modern sense of justice. In regard to such points, a teacher, during years of class-room work, gains many suggestive ideas from the bright minds found in the student ranks, and it seems to be his duty, as far as in him lies, to give such thoughts permanent form.

No matter how imperfect may be the attempt to accomplish this, good is likely to result if the work is sufficiently strong to invite attack and criticism on the part of well-informed thinkers.

After teaching the law of contract for twenty years, I have consented, at the earnest and continued solicitation of my colleagues in our Law Faculty, to formulate some of the results of this long experience, and to digest for publication the mass of notes and material gathered.

The desire to treat this subject in my own way, and in accordance with my own ideas, has given me courage to continue my work.

It has not been my aim to prepare a text solely for the use of students, but rather would I aid the efforts being made to place the law on a more philosophic and satisfactory basis.

There has been no attempt to prepare a digest of decided cases. Such work can be done more satisfactorily in books having this aim specially in view. Neither has there been

an effort to cite many cases. Authorities have been cited to illustrate or substantiate the discussion, and one well-argued case is believed to be as good as one hundred. The latest case is no more useful than an earlier decision, unless it changes or modifies a previously existing rule. Even some well-known and frequently cited cases have been omitted, when a reference to them would serve no useful purpose.

The law grows both by means of the opinions of able Judges and the treatises of scholarly writers. As in any branch of learning, one must make free use of, and build upon, the work of those who have preceded. I gladly acknowledge my great debt to the labors of such able and scientific thinkers. This is true not only of those whose works and articles have been specially examined during the preparation of this book, and which are given in a subjoined list, but also of others whose writings have unconsciously influenced my thought.

Especially am I indebted to the late Dean Langdell, and I here repeat with renewed force what I had occasion to write some ten years since, —

“The debt we all owe to the master mind of C. C. Langdell of Harvard is known to every modern thinker on contract.”

Particularly suggestive and helpful have been the numerous notes and articles by the late Dean James Barr Ames and by Samuel Williston, both of Harvard. I am under obligation to the writings of Mr. Justice Oliver Wendell Holmes, and have gained many thoughts from the interesting book by Harriman.

Acknowledgment is due to my colleagues on the Law Faculty of New York University, Messrs. Kenneson, Sommer, Tompkins, Aymar and Erwin, who have constantly aided me with valuable suggestions.

Mr. Frederick S. Parker, of the New York Bar, has read with care my entire manuscript, and his thoughtful criticisms have improved and strengthened the text throughout.

The many excellent and exhaustive collections of selected cases have been used freely by me, and have greatly reduced my work. A list of these collections is appended.

Miss Jessie Ashley, of the New York Bar, has aided me by verifying my citations, and finding helpful cases.

C. D. A.

NEW YORK UNIVERSITY.

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THE LAW OF CONTRACTS

INTRODUCTION

THE obligations treated herein are the modern consensual obligations now known under the much narrowed term "contract." They are based upon the agreement of the parties, which has become their chief characteristic.¹

¹ Formerly many obligations were called contracts which would not be so classified to-day. The explanation is to be found in the history of the action of Assumpsit. The action has never been confined solely to contract. Under the head of General Assumpsit recovery was allowed upon obligations which were not based upon agreement. It was seen that they were not true contracts, and they were given the misleading name "Contracts implied in law." This description is giving way to a name less confusing, but not entirely satisfactory, and they are now frequently known as "Quasi-Contracts."

Thus it is often said that a minor is liable upon his contract for necessities. He is liable for necessities furnished to him at his request, but not upon his promise. The obligation is *quasi-contractual*. It makes no difference what amount he has promised to pay, he is responsible only for the reasonable value. The same is true in those cases where a husband is chargeable for necessities furnished to his wife without his authority.

So also in *Taylor v. Root*, 4 Keys (N. Y.) 335 at p. 344, Woodruff, J., says: "A judgment is a contract of the highest nature known to the law." A judgment is not a contract, and whenever it is sought to establish consequences based upon such a theory the courts repudiate the idea. As when in *S. S. Co. v. Joliffe*, 2 Wall. 450, Miller, J., speaking of a judgment, says: "There is no element of contract; no consent of minds; no service rendered for which the law implies an obligation to pay."

See on this subject *Herzog v. Herzog*, 29 Pa. St. 465, 467; *Dusenbury v. Speir*, 77 N. Y. 144; *Columbus, Hocking Valley, & Tol. Ry. Co. v. Gafferty*, 65 Ohio St. 104.

The term "contract" has often been used in a sense which would be

§ 1. AGREEMENT¹

The agreement of the parties is known as mutual assent. While this is the characteristic of contract, nevertheless there are instances where the law will find mutual assent although agreement is lacking.² Thus where there is an ineffectual attempt to revoke an offer which thereafter ripens into a contract, or where a person's intent is not to contract, but his words or actions reasonably indicate the contrary to another, who appropriately and in good faith acts upon the apparent intention. In neither of these cases is there actual assent. Where there is an ineffectual attempt to revoke an offer, the offeror originally desired a contract, but he has changed his mind, and at the time the contract arises he wishes just the contrary.

Where one of the parties never intends to contract but gives reasonable indication of such intent, this is still more evident. If A in good faith supposes and understands B to mean what it is reasonable to suppose he does mean, the law cannot concern itself with B's unevinced mental attitude.³ Yet there is no actual agreement, although the

inappropriate now. For instance, when the duty which an individual owes to society has been said to be based upon his contract. Another example is to be found in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 514.

¹ In *Justice v. Lang*, 42 N. Y. 493, Lott, J. (at p. 497), in speaking of the requisites of contract, says, quoting from Comyn: "And 'six things appear necessary to concur: 1st. A person able to contract. 2d. A person able to be contracted with. 3d. A thing to be contracted for. 4th. A good and sufficient consideration, or *quid pro quo*. 5th. Clear and explicit words to express the contract or agreement. 6th. The assent of both the contracting parties.'" He also quotes with approval the following definition by Chitty (*Contracts*, p. 3): "'A contract or agreement not under seal may be thus defined or described. A mutual assent of two or more persons competent to contract, founded on a sufficient and legal motive, inducement or consideration, to perform some legal act, or to omit to do anything, the performance of which is not enjoined by law.'"

² See Holland, *Jurisprudence* (11th ed.), pp. 258-262, and *contra*, Anson, *Contract* (2d ed.), p. 10.

³ See *infra*, p. 52.

situation is such that the law treats the actions as equivalent to mutual assent.¹

§ 2. THE OBLIGATION OF CONTRACT IS IMPOSED BY LAW

Although agreement is the characteristic of contract, it must not be imagined that the parties themselves impose the obligation. All obligations exist by operation of law, and this is as true of contract as of tort; but in contract the parties have intended and desired that the law should annex the obligation, while in tort this is not so.

An obligation is placed upon a person as a result of certain acts previously done by him. The elemental acts which must precede the existence of contract are agreement and consideration. When the contract has once arisen we are no longer concerned with these requisite elements, because they must already have taken place, and are of the past. This is as true of contracts consisting of a promise on either side as of those having but one promise. As to agreement, it is evident that this must precede the contract, and this is necessarily true as to consideration where the offer demands an *act* for a promise. Until the act is completed there is no promise.² In the case of a promise for a promise, the same is true also, although this is not so apparent at first sight. The offer³ demands a promise as a consideration. Until

¹ It is evident that these exceptions are not only appropriate, but essential. The general rule which requires agreement for contract is otherwise of universal application. These necessary deviations need not be mentioned hereafter, nor specifically referred to in further discussion herein.

² Harriman on Contracts (2d ed.), § 622.

³ Offers are frequently described as being conditional, and consideration as a condition precedent to the existence of the contract. It is true that in a general sense the necessary preliminary elemental acts are precedent to the existence of the contract; but as the doctrine of conditions is used generally with reference to modifications of the contract when formed, it seems an unwise and unnecessary use of the term when it is applied to these elemental acts. Nothing is gained by talking about conditions to an offer or to the existence of a promise, and it is apt to cause confusion.

this promise is given, the first proposal remains an offer. As soon as the offeree furnishes the obligation called promise, the offer ceases to be such, and also becomes a promise. It is true that these two promises must arise at the same instant, but, at that point, they have been given and are past.

The term "obligation" has a double sense in our law; it indicates the obligee's right and also the obligor's duty.¹ A contract is called an obligation, and here the word stands for the effect which the law gives to the preceding acts resulting in contract, and also for the duty to perform placed by the law upon the promisor.

The word "contract" would seem properly to indicate only the relationship which arises between the parties, while the duty to perform is a result which flows from the fact that such contract or relationship exists.

Consequently in finding that the elementary acts have all taken place, and that the contractual relation has arisen, we determine nothing more than the fact that the party bound by the contract cannot withdraw without the consent of the promisee.² The effect of the contract, and the duty involved, can be determined only by examining its character and terms. Perhaps the promise is conditional, and the promisor may never be under duty to do or abstain from anything. His only duty in that event is to stand ready to keep his promise.

§ 3. NO ONE HAS A RIGHT TO BREAK HIS CONTRACT

Men make contracts with the expectation that they are to be performed, and a promisor has not a choice to perform or to pay damages. No man has a legal right to break his contract. Were this not so, law courts would have no

¹ Langdell, *A Brief Survey of Equity Jurisdiction*, 1 Harv. Law Rev. 55.

² Even in the case of so-called voidable contracts, it requires the aid of a court, if rescission is contested.

justification for imposing costs, nor courts of equity for enforcing specific performance.¹ The imperfect machinery of the law courts renders it impossible, in many cases, to do more than give damages, but this is no sound reason for holding that they recognize the right to break a contract.

If a man murders another, the courts can do nothing but punish him. Any man has the physical power to commit murder, but this does not prove that he has the lawful choice either to abstain from murder or pay the penalty, as he may see fit. He has no right to do the act. This is equally true of contract. The earlier conception of a breach of promise as a wrong amounting to a tort is not entirely foreign to the modern idea.

The obligations known as covenants or promises under seal have existed from the earliest period of our law, and years before the modern contract was known, even in its beginnings. These obligations do not, in reality, belong in the same class with simple contract.² They have their own peculiarities, and are of an entirely different character.

The same is true of commercial paper. Such instruments have many characteristics which differ totally from those of the ordinary contract. They originated in Europe, and are an importation grafted upon our law. So also recognizances, and stipulations of attorneys in actions, belong in a different class.

These various obligations should have been classified

¹ The fact that equity does, in reality, grant specific reparation rather than compel performance in no way affects the argument, because equity would have no right to interfere if the promisor had the option of paying money damages. It may also be pointed out that since the case of *Lumley v. Wagner*, 1 De G., M. & G. 604, equity courts go quite far in the direction of actually compelling affirmative acts. But see Holmes, *Common Law*, pp. 300, 301, and Anson's comments thereon, *Contracts* (Huffcut's 2d Am. ed.), p. 10. See also comments in *Holland, Jurisprudence* (11th ed.), p. 257.

² As covenants and contracts of record are usually included in treatises on contract, it has seemed convenient and wise to devote a chapter to these obligations. See *infra*, Chap. V.

separately. Confounding them with simple contracts has not only caused confusion and doubt as to this subject, but in the case of covenants and commercial paper has brought into those branches peculiarities of contract which have no place there.

§ 4. UNILATERAL AND BILATERAL CONTRACTS¹

As contracts arise from agreement, it necessarily follows that an offeror may state in his offer such terms as he desires, including the consideration which he demands for his proposed promise. He may ask for a counter promise from the offeree, or for some other consideration, which is not a promise. If he asks for a promise, his offer contemplates a bilateral contract. If he asks for an act, or anything but a promise, it contemplates a unilateral contract. It is purely a question of fact as to which species of contract is intended by the parties. Many questions may arise which can be determined only by settling this fact. Once decide this, and the rule of law to be applied is clear. Thus in the case of *American Publishing, etc. Co. v. Walker*² the defendant claimed that a unilateral contract was contemplated, and hence there was merely a standing offer for a year, which had been revoked. The Court found that a bilateral contract had been intended, and therefore there could be no revocation, the contract having arisen upon acceptance. The Court cites with approval the following language from the opinion in *Lewis v. Mutual Life Ins. Co.*:³

"It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the

¹ For further discussion see *infra*, at p. 78, under the head of Consideration.

² 87 Mo. App. 503.

³ 61 Mo. App. 534.

other party, such corresponding and correlative obligation will be implied."

In other words, if the circumstances indicate that the offer contemplated a bilateral contract, such intention will be found.¹

The terms "unilateral" and "bilateral" are convenient to designate the contracts which arise from these differing offers.²

A unilateral contract is one in which there is a promise on one side only, and only one party is bound. In a bilateral contract there is a promise on each side, and each party is bound. Thus where A has exchanged promises with B there is a bilateral contract, and where A has received an act or something which is not a promise in exchange for his own promise, the contract is unilateral.³

While these terms are convenient, and serve a useful purpose, they do not indicate a scientific classification. There is no difference in the nature of the contracts or in their origin. They all need mutual consent and consideration as prerequisites to their existence.

§ 5. FUTURITY IN CONTRACT

The word "promise" conveys the idea of futurity; something to be done or left undone hereafter. "Promise" and "contract" should be equivalent terms; a contract is a promise. Hence a transaction entirely carried out at its inception is not a contract.

¹ See Langdell, *Contract*, § 86.

Professor Langdell says: "In particular, when the contract is for services which are not to be paid for until they are fully performed, the contract should always be bilateral; and hence it will always be presumed in the absence of strong evidence to the contrary, that the parties intended to make it bilateral." It may be doubted whether there is any presumption. It seems to be merely an ordinary question of fact.

² See Williston's *Wald's Pollock*, p. 35, n. 40, showing the general use of these terms in modern law.

³ A bilateral contract which has been fully performed on one side is sometimes said to have become unilateral.

A sale of goods over the counter is a mere exchange of commodities, goods for money.¹ There is no futurity of action; no obligation of any kind, and hence no contract. If the goods are taken on credit, there is a contract, a promise to pay in the future.

Harriman² believes that this element in promise renders the term inaccurate as applied to contract, because he thinks there are contracts which do not involve futurity. Therefore he considers the term "assurance" more fitting than "promise." As an example of a contract without futurity, he suggests the case of warranty of soundness at the time of a horse sale.

But what sort of a contract can there be without the idea of doing something in the future? "I assure or promise you that the horse is now sound." Suppose it is not; what then? There must be something more to it, or there is no obligation whatever. An assurance of soundness in such a case really means that the assurer binds himself to make good to the purchaser in the future any loss he may sustain in case the horse turns out not to have been sound. A promise upon condition, and so intended by the parties. So also an assurance that it shall rain to-morrow, or that a proposed assignee of a lease is a suitable person,³ or that a third person shall paint a picture,⁴ or repay advances, are all conditional promises to pay any loss the promisee may suffer if the assured event does not happen.

§ 6. EXECUTORY AND EXECUTED CONTRACTS

It is customary to subdivide contracts as executory and executed. There is no advantage in this, while often confusion is caused. Owing to the element of futurity all contracts are executory, and the term adds nothing, explains

¹ Langdell, Contract, § 183.

² Contract (2d ed.), § 624.

³ Canham v. Barry, 15 C. B. 597.

⁴ But see Holmes, Common Law, p. 298.

nothing. In addition to this, the word "executory" has long been used in a different sense in real property law, which is an added reason for discontinuing its application to contract. It is believed that there is no such thing as an executed contract. One might as well speak of a dead live man. If the subject matter of the contract has been performed, that extinguishes the contract. It either exists or has terminated, is alive or dead. The subject of contract has enough inherent difficulties without adding to them by the use of unnecessary adjectives.

CHAPTER I

FORMATION OF CONTRACT

I. MUTUAL ASSENT

§ 7. There must be agreement

CONTRACT is based upon the consent of the parties to be bound, and this consent, which is commonly known as mutual assent, naturally resolves itself into offer and acceptance. Mere words of promise, not based upon consideration, amount in law to no more than an offer. An offer, as such, is not binding, and may be withdrawn at any time until it ripens into a promise.¹

§ 8. NEGOTIATION

Negotiations are preliminary to offers. Whether an offer has been made, or there is merely an invitation to negotiate, is a question of fact in each case.

Frequently before contracting, the parties exchange views and negotiate for terms. It is not unusual to invite persons to enter into such negotiations without making or intending to make an offer. Thus, department stores advertise special terms to bring people to their shops for the purpose of inspection and trade. These are not offers. Circular letters are often of this character. In *Moulton v. Kershaw*² the defendants sent to the plaintiff a letter

¹ But see discussion *infra*, at p. 86 .

When it is said that an offer is not binding, this does not indicate that a normal man is not responsible for the reasonable consequences of his acts, be they offers or other actions.

² 59 Wis. 316. The court quotes with approval the language of Foster, J., in *Lyman v. Robinson*, 14 Allen, 254: "That care should

in which they said: "We are authorized to offer Michigan fine salt, in full carload lots of 80 to 95 barrels, delivered at your city, at 85 cents per barrel, to be shipped per C. & N. W. R. R. Co., only." The plaintiff replied, ordering 2000 barrels "as offered in your letter." The Court construed the defendant's letter as an invitation to trade and not an offer. In reaching this view, weight appears to have been given to the fact that defendant's letter named no specific quantity, but this does not seem to warrant their conclusion. As plaintiff's counsel contended, the letter must mean that they will supply such amount as may be reasonable in view of all the circumstances, and he offered proof that 2000 barrels was reasonable. In *Kelly v. Ybarru*,¹ which is cited in the opinion, the amount of grapes was held to be limited to the crop from the vineyard named.

On the other hand, in the case of *Carlill v. Carbolic Smoke Ball Co.*,² the Court found an offer in an advertisement which read "100£ Reward will be paid by the Carbolic Smoke Ball Co. to any one using the smoke balls as directed, and thereafter contracting the epidemic influenza colds, etc."

In these cases it is a question of fact whether the advertisement or writing in question reasonably indicates an intent to contract, or merely amounts to an invitation to bid. Thus in *Moulton v. Kershaw*,³ one may differ from the Court's finding of fact as to the reasonable interpretation of the letter under consideration; but once the question of fact be settled, the conclusion of law is simple. The Court finding as fact that no offer was made, it follows that there was no contract.

It seems that exposing goods in a shop window with the price attached is in general simply an invitation to trade. So also, in most cases, a submission of estimates does not constitute an offer, but amounts to a mere statement of

always be taken not to construe as an agreement letters which the parties intended only as preliminary negotiations."

¹ 3 Cal. 147.

² L. R. 2 Q. B. 484.

³ 59 Wis. 316.

views. Thus in *White v. Corlies*,¹ the offer was made when the defendant wrote a letter after submission and correction of estimates.

Sometimes the terms of a proposed contract are agreed upon, but the parties contemplate a reduction to writing and execution by them. There also it is a question of fact, whether it is their intention that there shall be an obligation immediately or only when the writing is signed. In the former event neither party can escape liability by refusing his signature to the instrument when drawn.² In the latter there is no contract until the writing is executed.³

Where some of the material terms are still unsettled, there is no agreement and consequently no contract.⁴

§ 9. OFFER

Before there can be agreement there must be an offer, or some proposition submitted to the parties.

In order that there may be agreement there must be some point at which one of the parties makes a definite proposition to the other, or at which they mutually agree upon some proposition submitted to them. There may be much preliminary negotiation and exchange of views, but ultimately a proposal must be made, or there can be no agreement.⁵ It is not sufficient that two minds coincide at the same moment. Thus if by chance two men, one in Albany and another in New York, happen to have the same thought at the same instant concerning the purchase and

¹ 46 N. Y. 467, see *infra*, p. 47.

² *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209.

Reduction to writing may be an express or implied part of the contract. In that event equity will in a proper case compel execution by a decree of specific performance. *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390.

³ *Mississippi & Dom. S. S. Co. v. Swift*, 86 Me. 248. In this case there is an extensive review of the authorities.

⁴ *Page v. Norfolk*, 70 L. T. R. n. s. 781; *Shepard v. Carpenter*, 54 Minn. 153.

⁵ See Williston's *Wald's Pollock*, p. 6.

sale of a horse belonging to one of them, there is no contract although the thoughts coincide. There would be no agreement in the legal sense, even if each party forwarded the identical proposal and these proposals crossed in the mails and each was received.¹

As Woodruff, J., says, in *Fitch v. Snedaker*:²

"To the existence of a contract there must be mutual assent, or in another form offer and consent to the offer. The motive inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How, then, can there be consent or assent to that of which the party has never heard?"

As the agreement of the parties is the first requisite, there must be the intent by both to enter into the proposed arrangement. To bring about this mutual intent, communication of some sort is essential, some definite proposal contemplating a juristic act. Generally this is made by one of the parties to another, and is ordinarily called an offer. An offer, then, by the meaning of the term involves actual communication. An offer uncommunicated is inconceivable. The word "communication" is here used in its exact sense, that is to say, information brought home to the intelligence of the party for whom it is intended.³

¹ The question was discussed in *Tinn v. Hoffman*, 29 L. T. R. N. S. 271, although the case did not call for a decision on that point.

² 38 N. Y. 248, 251.

³ Langdell points out (*Contract*, § 130) that the juristic conception of offer involves two elements, — mental intent, and its outward manifestation. He formulates it as follows: "An offer is a physical and a mental act combined, the mental act being in legal intentment embodied in and inseparable from the physical act." He very properly criticizes the idea that the overt act is merely proof of the mental state. This calls attention sharply to the difference in characteristic between offer and acceptance. In the former the mental state must be physically communicated to the offeree before any offer exists, and the mere mental intent, even if outwardly manifested, is of no consequence, if not brought to the knowledge of the offeree. In other words, the physical act of communication is one of the elements of offer. While in the case of acceptance, the mental act completes the actual agreement, and the overt act is required for the purpose of proof. (*Infra*, p. 52.)

If there is to be any agreement on the subject matter of the offeror's thoughts, they must be made known in the first instance to the offeree.

Therefore an offer sent by mail becomes effective only when received and read by the offeree.¹

In *Taylor v. Jones*,² the question was raised as to the jurisdiction of the Mayor's Court of London, and this turned upon whether the cause of action occurred wholly in London. The Court held that it did. The defendant in London sent to the plaintiff out of the city an order by mail for certain goods. The plaintiff sent the goods to London by his own messenger, who delivered them to defendant there. This was a case of unilateral contract, and the delivery of the goods in London was the performance of the act; hence the contract arose in London, was broken there, and the cause of action arose there.

¹ It follows that if a proposed offer is mailed in Boston, Mass., to a man in New York, the offer is made in New York, as it is communicated there. If the offeree does an appropriate act in New York, such as mailing a suitable acceptance, a contract arises upon the mailing. In other words, the New York law governs, and there is a contract even if the answer is never received by the offeror. So also if a man in New York City mail a proposed offer addressed to a man in Boston, no contract can arise upon the mailing of a proposed acceptance, because by the Massachusetts law no act has taken place which amounts to an acceptance. There is no contract until the letter of acceptance reaches New York. The contract arises in New York, and is governed by the law of that State. In both of these illustrations we have a New York contract. One further question may arise in the second illustration. Suppose the Boston letter of acceptance is carried in due course over the New York line, does a contract arise instantly? The acceptance is in the mail and the requisite overt act of the New York law has taken place. Accordingly, if the letter should be destroyed ten feet within the New York line such destruction would have no effect, while if it took place ten feet before reaching the line there would be no contract. This would be the strictest logical result. But suppose the letter *en route* passes through Connecticut, does that law play any part? Probably the courts would be forced to hold that no contract could arise until the letter of acceptance reached the New York City post-office, and that then the New York law would apply. *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380; *Commonwealth Ins. Co. v. Knabe*, 171 Mass. 265; *Burton v. United States*, 202 U. S. 344.

² L. R. 1 C. P. Div. 87, 90.

The Court, while reaching a correct conclusion, seemed to have the erroneous notion that the offer must have been made in London. It was immaterial where the offer was made, as the contract arose when the consideration was given in London.

To carry out their idea, the Court struggled to show that the order was made in London when it was mailed; in other words, that an offer can be made before it is communicated. Lord Coleridge, C. J., naïvely remarked:

"I say the order was given in the city, because I see no distinction in principle (and there is none in any of the authorities) between the case of a letter accepting an offer, and a letter containing an offer for goods." And Archibald, J., after saying that "*Dunlop v. Higgins*¹ decides that a letter containing an offer speaks from the time when and the place where it was posted," adds, "here there was a complete order when the buyer posted the letter ordering the goods," while Amphlett, B., says: "The moment the defendants' letter containing the order was put into the post, there was a good offer made."

It would be difficult to conceive of any greater misconception of what is an offer, and its functions, than is contained in the above statements.

Lindley, J., in *Bennett v. Cosgriff*,² says:

"I think the true construction of both cases is, that a letter is a continuing offer, or order, or statement, by the sender, which takes effect in the place where the person to whom it is sent receives it."

This is the sound view.

Again, in the case of *Gibbons v. Proctor*,³ it seems impossible to reach the conclusion of the Court, unless one finds that an offer calling for an act may be accepted even before it is made, or is known, to the supposed acceptor. That

¹ 1 H. L. C. 381.

² 38 Law Times Reports, N. S. 177.

³ 64 *idem*, 594.

was a case of an offer of reward for information leading to the conviction of an offender, such information to be given to one Penn, superintendent of police. This notice was published in the afternoon. In the morning of the day of this publication, the plaintiff, a police officer, gave certain information to one Coffin, a fellow policeman, and directed him, as his agent, to inform the proper authority. Coffin, pursuant to rules, reported to Inspector Lennen, and Lennen to Superintendent Penn. When Penn was thus informed he had notice of the offer. The information so supplied led to the arrest and conviction of the offender.

The Court finds that both Coffin and Lennen were plaintiff's agents to carry the information to Penn, and allowed plaintiff to recover.

We have this peculiar result: the plaintiff, in ignorance of the proposed offer, accepted the same, or, while thus ignorant, authorized his agents to accept, although he did not have the possibility in mind that such offer would be made. The case is an anomaly, and cannot be sustained on any theory.

§ 10. (a) **Unless otherwise terminated, an offer remains in force,**

- (1) *During such time as the offeror may designate, or,*
- (2) *If no time is designated, a reasonable time, which is a question of fact, probably for the Court, and not for the jury.¹*

An offer is made because the offeror desires a contract upon the proposed terms, and he must intend that the

¹ The cases do not make it clear whether the Court or jury shall pass upon questions of fact arising as to various elements of contract. Thus what may be a reasonable time for an offer to remain open is clearly a question of fact. In *Maclay v. Harvey* (90 Ill. 525) the Court determined that a letter of acceptance was mailed too late, i. e. determined the fact that the offer did not remain open so long. On the other hand, Langdell says (Contract, § 154) it is a question of fact for the jury "not one of law for the Court." He cites no authority, and it seems likely that his attention was fixed upon showing that it was a question of fact, not of law, and so applied the old but mistaken test. (Courts determine

offeree shall have time to consider the proposition. He may state in his offer how long it is to remain open, in which case it will continue such length of time, unless sooner withdrawn. If no time is stated, the offer, provided it is not otherwise terminated, remains in force for a reasonable time. What amounts to a reasonable time is a question of fact in each case. Generally, if a contract is made between parties present, the offer will continue only until they separate. Circumstances may alter this, as where the offer is of such a character that the offeree may reasonably need more time to reach a conclusion. In real estate matters this is often true.

Where an offer involving a commercial transaction is made by mail, it will continue during the business day upon which it is received, and if the offeree desires to accept he should forward his answer on such day.¹ Perhaps this may be said to have ripened into a rule of law. An offer by telegram would ordinarily indicate that a reply is to be made

many questions of fact. See Thayer, Preliminary Treatise in Ev., Chap. V, p. 183.)

In *Loring v. Boston* (7 Metc. 409) the Court decided that three years and eight months was not a reasonable time for an offer to remain open, and cited with approval *Field v. Nickerson*, where the Court held that eight months was not. The cases are numerous where the Courts have decided the fact as to reasonable time for an offer to continue. But in *Perry v. Mt. Hope Iron Co.* (15 R. I. 380, 382), the Court said: "If there be any question that the telegraph is a natural and ordinary mode of transmitting such an acceptance, that is a question of fact for the jury."

In *Moulton v. Kershaw* (59 Wis. 316) the Court decided the question of fact as to whether the defendant's letter was an offer or merely an invitation to trade; and in *White v. Corlies* (46 N. Y. 467) the Court of Appeals decided the question of fact as to the sufficiency of the carpenter's outward manifestation.

Courts have not yet given the subject much thought, but on the whole these questions of fact are probably for the Court and not the jury. At any rate, that seems to be the better and more convenient rule.

¹ *Dunlop v. Higgins*, 1 H. L. Cas. 391.

If the offer is received at the end of a business day an acceptance sent the next day will ordinarily be in time. See *Maclay v. Harvey*, 90 Ill. 525. If there is no return mail on the same day nor other reasonable method of forwarding an answer, the time will be extended ordinarily until the next mail.

promptly and by the same method. Whether a proposed acceptance is forwarded in time in a given case is a question of fact.¹

When a contemplated offer is forwarded by mail, its delivery may be expected in due course, allowing for ordinary delays.² If, however, the delay is beyond a reasonable time, the offer in fact never arises, although the letter is received and read. For instance, should a letter involving a business proposition, or perhaps a proposal of marriage, be received after a delay of ten years, it would be grotesque to suppose that then it could be treated as an offer and accepted. Whether or not the proposal comes too late to be an offer is also a question of fact.

In the case of *Maclay v. Harvey*,³ the defendant Harvey had sent Maclay an offer by letter, calling for an answer "by return mail." A proposed acceptance was written promptly, and delivered to a boy for mailing. Through the neglect of the boy, the reply was not mailed until two days later. This delay was held to be too long.

The Court, with a dissenting opinion, held that there was no contract, but both the majority and the minority opinions made the case turn upon a question of waiver. The majority opinion, referring to the delayed reply, said, "Appellee was, therefore, under no obligation to regard the contract as closed. He might, it is true, have done so, but he was not legally bound in that respect." And further down, referring again to the delay, the Court says: "It was incumbent upon her [the plaintiff], before assuming that appellee waived this objection, to ascertain that he in fact did so."

The dissenting opinion, after agreeing that the reply was too late, continues, "The point on which I differ from my brethren is this: I think the evidence tends to show that he did, in fact, *wave* the delay; that he did in fact treat 'the

¹ For a collection of authorities on the point, see Williston's *Cases on Contract*, p. 41, n. 1.

² *Adams v. Lindsell*, 1 B. & Ald. 681.

³ 90 Ill. 525.

postal card as the consummation of a contract'; that he did regard the contract as closed."

There was no pretense that the delayed reply was accepted as a new offer.

One would suppose, when the reply was mailed, there either was or was not a contract at that instant, depending upon the application of the law to the facts; but this Court makes the subsequent desire of the offeror the determining factor. This is wrong.

When mutual consent and consideration are found, the law attaches the obligation; if either of these essentials is lacking, this result does not follow. There is no such thing as "waiving" an essential element. It is clear that, in a bilateral contract, both parties are bound at a given point, or neither is; yet the Court, in *Maclay v. Harvey*, seems to think that one party may or may not be bound, at the whim of the other.

There is no mutuality if the offeree, Maclay, be irrevocably bound upon mailing the postal, at the election of Harvey, the offeror, who is still free. The Court found as fact that the acceptance was mailed too late, and it necessarily followed that the offer had terminated. As there was no offer in existence, there could be no agreement and no acceptance. The parties cannot waive agreement.¹

§ 11. (b) An offer may be made by action as well as by words

The spoken or written word is not essential to an offer. Action, which reasonably causes a normal mind to believe

¹ See *Ferrier v. Stores*, 63 Ia. 484, 487, and *Williston, Cases on Contract*, Vol. I, p. 149, note. It will be noticed that there is no ground for estoppel here such as is found in the instances suggested *infra*, at p. 60.

The decision might be sustained on the theory that writing the postal was a sufficient outward manifestation of assent, causing the contract to arise then and there, mailing in time being a condition precedent which could be waived. (See *infra*, p. 38.) Under the facts of that case, however, mailing would seem to have been the first sufficient manifestation of intent, and hence the delay prevented the contract from arising.

that a proposal is being made to it, may indicate an offer, and be effective.

By conducting a transportation business, a railroad company makes a standing offer to carry passengers or freight according to its published or customary methods. A passenger on approaching a ticket office and tendering his fare is accepting an offer of the company which calls for an act on his part, namely, paying a regular fare. When this has been done, the company has promised to carry him in its usual manner, subject to reasonable changes, at the times announced in its tables.

Hence if the company suddenly and unreasonably change its time-tables, a passenger who is about to buy his ticket but has not yet done so, has no cause of action, because there is as yet no contract. Should he be allowed to buy his ticket without reasonable notice, he would have accepted the offer originally made, including the previous train schedule. In such a case it is probable that notice of the change posted in the station would be sufficient to modify the offer. But if the would-be passenger has already bought a ticket, there now exists a contract whereby the company promises to run its trains as advertised, subject to reasonable change published reasonably.

In *Sears v. Eastern Railroad Co.*¹ the plaintiff, who had bought a package of tickets, presented himself for passage and found that the running time of the train he desired had been changed. The company published its train schedule in several daily papers, but the change of time for this train was notified by handbills posted in the cars and stations. Plaintiff did not see these. The sole question was whether this change of time was reasonably made and announced. This was a question of fact. The Court allowed the plaintiff to recover, thus finding that the method of announcing the change was not reasonable under the circumstances.

In the course of its opinion the Court seems to

¹ 14 Allen, 1, 133.

become confused between questions concerning offer and that raised in the case. Thus after a statement of fact and an analysis showing a contract, which permitted reasonable change of trains, and giving grounds for thinking the change unreasonable in this case, the Court goes on to say:

"But it would be contrary to the elementary law of contracts to hold that persons who relied upon the advertisements in either of those papers would be bound by a reservation of the offer, which was, without their knowledge, posted up in the cars and stations. If the defendants wished to free themselves from their obligations to the whole public to run a train as advertised, they should publish notice of the change as extensively as they publish notice of the regular trains."

Just what the court means by this dictum is not clear. The reference to "obligations to the whole public" is not intended to bring out the public duty of which a breach is a tort, because the Court is discussing the principles of contract. Yet it is absurd to talk about a contract with the whole public.

Probably the Court has in mind the offer which the company is making by running its trains, in which case the suggestion is correct enough, but not appropriate to the case under discussion.

When a passenger enters a train at some way station, without first purchasing a ticket, the contract must be bilateral, a promise on the part of the company to carry the passenger at the regular rates to the station he may name, and a promise by the passenger, indicated by entering the train, to pay such rate. The same thing is true of a street line. To hold that a unilateral contract is contemplated involves difficulties. If we say that the passenger offers to pay for a ride to his destination, then the money is not due until he has arrived there, and on the other hand the company never promises anything. Or if the company promises

to carry in exchange for five cents, then the passenger never promises to pay, and unless the fare is collected on entering, the passenger may ride some distance before the conductor reaches him, and then leave the car, having incurred no obligation. The same is true where one takes a cab. In these cases stepping onto the car or into the cab indicates the action of a reasonable man intending to promise. If a surface car bears upon its front the words "125th Street," that fairly indicates an offer on the part of the company, subject to reasonable delays or accidents, to carry the passenger to 125th Street in that car. Hence if the company, for its own convenience, and without reasonable cause, before reaching 125th Street orders the passengers to take the car ahead, it breaks its promise implied from the sign in front.

On the other hand, when a small boy indicates by his actions an intent to steal a ride, or a tramp does the same thing, no promise can be implied from such conduct.

By the carrying on of their business these transportation companies reasonably may be said to be making an offer contemplating contracts of the usual kind at the ordinary prices. If they desire to limit this general offer by special terms, they must call attention to such modification at the time the contract is made, and this must be done in a reasonable manner. An unreasonable, and hence ineffective, attempt of this sort was found when, in exchange for a trunk check, a baggage transfer company, in a dark car, delivered a receipt on the face of which in fine print was a limitation of liability, attention not being called to the modification.¹ The recipient had no reason to suppose there was any change in the company's general offer. It would be otherwise, however, if the car were light.² If the limitation is on the back of the ticket or receipt, it is unavailing without some reference thereto on its face. Of course, in any case, if the person

¹ *Blossom v. Dodd*, 43 N. Y. 264.

² *Henderson v. Stevens*, L. R. 2 Scotch Appl. Cases, 470; *Kirkland v. Densmore*, 62 N. Y. 171.

contracting has actual knowledge of the limitation, that is enough.

When one goes to an express office and upon delivering a package receives a receipt, on the face of which is printed in minute type a long list of limitations, it might seem that this is not a reasonable method of calling attention to modifications of the offer, but the Courts hold otherwise. One must, at one's peril, take notice of all such matter.

§ 12. (c) A proposal made through the public press, or otherwise advertised, is an offer when communicated to an individual

Such offers usually contemplate unilateral contracts. There must be an acceptance by some one in order that a contract shall arise, and necessarily there can be no acceptance if the person performing the requested act has no knowledge of the offer.

These offers contemplate unilateral contracts, and while there must be acceptance, yet if any one performs the act or service requested, this may be inferred without actual proof. If there is intent to accept, the contract arises upon performance of the requested service during the continuance of the offer, and the offeree is then entitled to the reward promised.

In *Williams v. Carwardine*¹ a handbill was published by the defendant stating that a reward would be paid to the person giving information which should lead to the discovery and conviction of a murderer. The plaintiff having been beaten, and believing herself about to die, in order to ease her conscience gave information which led to such capture and conviction. In an action in assumpsit for the reward, the jury found that the plaintiff was not induced by the offer of the reward, but by other motives.

The Court allowed the plaintiff to retain the judgment on the ground that she had performed the act asked, her motives being immaterial.

If an offer is accepted, the motives which induced the

¹ 4 B. & A. 274.

acceptance are of no consequence.¹ The question raised by the case of *Williams v. Carwardine* is whether the finding of the jury indicates that there was no intent to accept, or merely that the acceptance was induced by other motives than the reward. If the case can fairly be construed as indicating that there was no intent to accept, then the decision is wrong, because there must be acceptance, but if there was acceptance, then the case is correct. Pollock² treats the decision as an authority for the proposition "that there is a contract with any person who performs the condition named in the advertisement," and further³ on says "such a doctrine cannot now be received though the decision may have been right on the facts."

Langdell⁴ thinks the plaintiff had "neither accepted the offer nor performed the consideration," and considers the decision wrong.⁵ However the facts of *Williams v. Carwardine* may be interpreted, it will be generally conceded that unless there is intent to accept there can be no agreement.⁶

* See 3
P15
* The person performing the act indicated in the offer must know of the offer or there can be no contract.

The cases in this country to the contrary are clearly wrong, and cannot be sustained on principle. *Dawkins v. Dappington*⁷ was decided upon the supposed authority of *Williams v. Carwardine*, and held that the defendant was liable although plaintiff did not know of the offered reward. The Court talks in a vague way about morality and public policy, but there is no argument to sustain its position, and no thought given to the unanswerable objection raised in *Fitch v. Snedaker*⁸ that it is impossible to accept an offer of which one is ignorant. Unless the liability in these cases

¹ *Thomas v. Thomas*, 2 Q. B. 851.

² Williston's *Wald's Pollock*, p. 13.

³ *Idem*.

⁴ *Contract*, § 4.

⁵ See *Holmes, Common Law*, p. 294, n. 2.

⁶ *Hewitt v. Anderson*. 56 Cal. 476.

⁷ 26 Ind. 189.

⁸ 38 N. Y. 248.

can be based upon contract, it does not exist. There is no other maintainable ground.

In *Auditor v. Ballard*,¹ Peters, J., says:

"If the offer was made in good faith, why should the defendant inquire whether the plaintiff knew that it had been made? Would the benefit to him be diminished by the discovery that the plaintiff, instead of acting from mercenary motives, had been impelled solely by a desire to prevent the larceny from being profitable to the person who had committed it? Is it not well that any one who has an opportunity to prevent the success of a crime may know that by doing so he not only performs a virtuous service, but also entitles himself to whatever reward has been offered therefore to the public."

There seems to be no conception on the part of the judge using this language that any principle of contract is involved, and yet no suggestion is made as to any other theory of obligation. As is said in *Howland v. Lounds*,² "The action is in fact upon contract." There might be some advantage in a statute³ giving a recovery in such cases as that of *Auditor v. Ballard*, but it is clear that upon principle of contract *Fitch v. Snedaker* and similar cases are correct and unanswerable.

§ 13. (d) Options

An offer of sale, with the period of its duration designated, is often called an option.⁴ Such offer may be withdrawn at any time before it becomes a promise. This is true even though the offeror has contracted to keep the offer open.

An option does not differ in its effects from other offers. A proposed purchaser is given time within which he may accept an offer of sale. Sometimes the offeree requests and

¹ 9 Bush. 572, 575.

² 51 N. Y. 604, 609.

³ For an example of such a statute see the German Civil Code, §§ 657 to 661.

⁴ An option is sometimes called a "refusal."

pays for the option. Analysed, this is a contract to keep an offer open. Even then the offer may be withdrawn, and a contract of purchase prevented. This would break the promise to continue the offer, and liability therefor would be incurred.

It has been said that an option for which a consideration has been paid prevents the withdrawal of the sale. In other words, that such an option produces an irrevocable offer. But this is contrary to the legal conception of an offer.¹

As has been pointed out above,² the continuation of an offer simply means that the offeror states, expressly or impliedly, that he will remain in the same state of mind. When he contracts to do so, it does not follow that he may not still change his mind and terminate the offer. He breaks his contract, which he should not do; but this is possible for him, nevertheless.

Promises to convey property upon condition have been confused with contracts to keep an offer open, but they are very different. We have many instances of such conditional contracts, but contracts to continue an offer are not numerous.

The Courts frequently use language which would lead to the belief that the contract they are considering is to keep an offer open, but an examination of the facts will generally show a conditional promise to sell.

To illustrate: Suppose an owner of real property offers to sell his land for \$10,000, and states that his offer is to remain open one week. No one doubts that this offer may be withdrawn. But suppose he promises, in consideration of \$50, to keep the offer open one week. As shown above the situation is not changed, and the offer can be withdrawn.

In cases of contracts for the conveyance of property upon a condition, there is a very different situation. Thus suppose

¹ Langdell says: "An offer, therefore, which the party making it has no power to revoke, is a legal impossibility." He further says: "That a contract incapable of being broken is also a legal impossibility," and that a contract such as is discussed above cannot be specifically enforced by equity. Contract, § 178.

² *Supra*, p. 13.

an owner, in consideration of \$50, promises to convey his land upon the condition that within one week from date the promisee notifies him and tenders \$10,000. As there is a promise to convey, equity need have no difficulty in decreeing its performance upon the happening of the condition.¹

§ 14. (c) **An offer terminates:**

§ 15. (1) *By becoming a promise.* An acceptance which is not also a counterpromise, does not terminate the offer. This occurs in cases of offers calling for unilateral contracts. There the offer does not become a promise upon acceptance, but upon the performance of the act.²

§ 16. (2) *By expiration of the period designated by the offeror, or if none be stated, then of a reasonable time.*³

¹ It may be suggested that when there is a contract to continue an offer, as the contemplated transaction is for the transfer of real property, equity will not allow the offer to be withdrawn, and will decree specific performance. First equity will have to compel the parties to make the contract of sale, and when it is thus made, compel the defendant to perform it.

Plaintiff in his bill must pray the Court to decree the specific performance of a contract not then in existence.

Although these difficulties exist, it seems possible that equity might overcome them. In cases of a promise to leave real property by will, equity compels the person taking the property, whether by devise or inheritance, to convey to the promisee. Here the difficulty is greater than in the cases mentioned in the text, because the promisor is dead, and hence a will, as promised, has become an impossibility. Thus in *Colby v. Colby* (81 Hun, 231) Lewis, J., says: "While an agreement to make a certain disposition of property by last will is one, which, strictly speaking, is not capable of a specific execution, yet it has been held to be within the jurisdiction of a court of equity to do what is equivalent to a specific performance of such an agreement, by requiring those upon whom the legal title has descended, to convey the property in accordance with its terms. 3 Pars. on Cont. 405. And the Court will not allow the post mortem remedy to be defeated by any devise inconsistent with the agreement."

See Ames, *Cases on Equity Jurisdiction*, p. 146, n. 1, and authorities cited. In these cases of promises to keep an offer open it may well be that equity will also refuse to allow the remedy to be defeated "by any devise inconsistent with the agreement."

² See *supra*, p. 6.

³ See *supra*, p. 16.

§ 17. (3) *By the death or insanity of the offeror.* There must be a mind behind the offer.¹

Death or insanity of an offeror causes an offer to terminate at that instant.

An offer necessarily presupposes that there is a mind behind it. How can a proposal or offer exist when there is no one making it? The offeror in reality indicates by his offer that he will remain in a certain state of mind for a period. Death prevents this. It is further evident that an offeree cannot agree with the offeror after the latter has ceased to exist. The term "revocation" used in such a case is inaccurate. Revocation indicates will or intent, while here there is no mind to so will or intend.²

¹ *Pratt v. Trustees*, 93 Ill. 475; *Jordan v. Dobbins*, 122 Mass. 168.

² This is the well-settled law, but why should it be so? The reasons given above are logical, but after all are they satisfactory? It is true that one cannot contract with a dead man, and of course after death there can be no actual agreement. But the same situation as to agreement exists when the offeror changes his mind, but is unable to revoke his offer before it becomes a promise. A promise is merely a personal obligation, yet the law finds no difficulty in saying that most promises bind the decedent's estate. As the law does not insist upon actual agreement, so long as an offer has been made and accepted, why should it not be just as consistent to say that as a man is responsible for all the results which may follow from his making an offer, so his estate will be equally responsible in case he dies. Statutes have voiced the modern thought as to the survival of many obligations arising from tort. Why should not the Courts hold that any offer which is so accepted as to cause a contract to arise, if the offeror is alive, shall have the same effect even though he may be dead at that time, provided only that the offeree is ignorant of the death?

We say that an offer ripens into a promise, and hence the conclusion that it is absurd to talk about a promise by a dead man. But that is simply a form of speech, and does not indicate any essential principle. A promise is simply the obligation which the law places upon a man when certain preceding facts concur, and there need be no difficulty in saying that an offer under such circumstances shall constitute one of such facts, so that the law may place the obligation upon his estate instead of upon the offeror himself, as would otherwise happen.

It may be that the rule is now too well settled to permit of any change by the Courts, but in that case legislation might be advisable. It is provided by the German Civil Code (translation by Chung Hui Wang), at § 153, as follows: "The conclusion of a

§ 18. (4) *By rejection.* Either as a counter offer or as direct refusal.

An offeree is not obliged to take action with reference to an offer. If he does nothing, it lapses in due time. But he may terminate the offer earlier by rejection.

Any counter proposition is a rejection, whether in form a new offer, or a proposed acceptance changing some material term.¹ This is so even though such alteration be made inadvertently.

Upon rejection the offer terminates, and it is futile for the offeree to attempt an acceptance thereafter. There exists then no offer to accept.

Sometimes while an offer is pending the offeree asks some question as to the offer, either seeking some explanation, or with a view to obtaining better terms. Such a question is not a rejection.

To be effective as a rejection, the counter proposition must be communicated² to the offeror. It is believed that the conclusion is sound.

The offer when made is necessarily intended to continue for some period, however brief. This is for the purpose of consideration by the offeree, and when the latter once indicates his state of mind to the offeror, the offer has performed its function. If it has not become a promise by acceptance, it terminates. The offeror then knows the offeree's state of mind, and that ends the matter. But without communica-

contract is not prevented by the fact that the offeror dies or becomes incapable of disposing before acceptance unless a contrary intention of the offeree is to be inferred." The final clause as to intention seems rather singular.

¹ *Minneapolis & St. Louis Railway v. Columbus Rolling Mill*, 119 U. S. 149.

² Singularly enough there appears to be no decision involving the point, and the various text-books do not refer to it. If the question was purely academic, it might be of little consequence. In its application, however, vexing questions may arise, and such problems should be solved upon principle. The chances of hardship or inconvenience are as great upon one theory as upon the other.

For examples of this see *infra*, under estoppel, at p. 61.

tion the offeror can have no such knowledge. This seems to be the reasonable explanation of the requirement of law in this case.

§ 19. (5) *By revocation.*

*An offer may be revoked until it ripens into a promise. To constitute revocation there must be communication, that is, knowledge of such revocation must be brought to the mind of the offeree.*¹

As has been pointed out,² an offer is left open in order that the offeree may have time to consider the given proposition. The offeror having stated his desire in the matter, and indicated that he expects to remain of the same state of mind, the offeree has a right to rely upon this unless he is informed to the contrary. The offeror need not make the offer, but if he does, he must abide by the consequences. A change of mind on his part will have no effect, unless he notifies the offeree before his offer has become a promise. As it has been well put,³ "One to whom an offer is made has a right to assume that it remains open, according to its terms, until he has actual notice to the contrary. The effect of the communication must be destroyed by a counter communication." This is now the well-settled rule.

The English Courts appear to have introduced a variation by the case of *Dickinson v. Dodds*.⁴ There an offer was made for the sale of real property, and while it was still pending the offeror made a contract to sell the property to a third person. Knowledge of this fact coming to the offeree, he immediately attempted to accept.

The Court was of opinion that this knowledge was equivalent to a revocation, and gave judgment for the defendant.

Anson⁵ regards the case as "at variance with *Byrne v.*

¹ *Byrne v. Van Tienhoven*, 5 C. P. D. 344.

² *Supra*, p. 26.

³ Holmes, Common Law, p. 306.

⁴ 2 Ch. D. 463. See for comments on the case, Langdell, Contract, § 181, and Williston's *Wald's Pollock*, p. 32.

⁵ Contract, p. 47 (Huffcut's 2d ed.).

Tienhoven,"¹ and says "that it must be regarded as overruled by *Henthorn v. Fraser*."² But there was nothing in *Byrne v. Tienhoven* inconsistent with *Dickinson v. Dodds*. There we have an offer accepted by cable on October 11th, and by letter mailed on the 15th, while a letter of revocation mailed on the 8th was not received until the 20th. At the time of acceptance the offeree had no knowledge of the attempted revocation, or of any act on the part of the offeror inconsistent with the offer. The case merely decides that a revocation does not become effective on mailing.³

Henthorn v. Fraser not only does not overrule *Dickinson v. Dodds*, but is entirely consistent with it. Lord Herschell says at p. 33:

"The case of *Dickinson v. Dodds* was relied upon in support of that defense. In that case, however, the plaintiff knew of the subsequent sale before he accepted the offer, which, in my judgment, distinguished it entirely from the present case."

With his customary astuteness, Langdell⁴ points out that *Dickinson v. Dodds* does not involve the point of revocation. He says, however, that the Court undoubtedly laid down the proposition that the offer was revoked by the subsequent contract with Allan, "either alone, or together with plaintiff's knowledge."

Pollock⁵ raises the quære as to the effect in such a case of a communicated acceptance by the offeree to the offeror in ignorance of the offeror's acts, and says: "This question remains open and must be considered on principle." But why should it be considered as open? The well-settled rule

¹ 5 C. P. D. 344.

² L. R. 2 Ch. 27.

³ "The grounds upon which it has been held that the acceptance of an offer is complete when it is posted have, I think, no application to the revocation of an offer. These can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made." Lord Herschell, in *Henthorn v. Fraser*, L. R. 2 Ch. 27, 32.

⁴ Contract, § 181.

⁵ Williston's *Wald's Pollock*, p. 33.

is that there must be communication of the revocation. *Dickinson v. Dodds* assumes, as fact, that the action of the offeror indicates a change of intention, and that the offeror knows this. Why is anything more necessary? The offeree knew that there was a change of mind, and was no longer justified in supposing the offer still open. One might object that the facts do not necessarily show a change of mind, and that perhaps the offeror may have made arrangements to take back his property in case the first offer is accepted, or he may have known that he could buy it back. This is very true, and it may be impossible to find a case where the facts warrant an offeree in assuming a change of mind; but this is simply a criticism of the Court's finding of fact, and not of its conclusion.

The Court found that *Dickinson* actually knew that *Dodds* had changed his mind, and so knowing, attempted to accept. *James, L. J.*, says:

"But in this case, beyond all question, the plaintiff knew that *Dodds* was no longer minded to sell the property to him, as plainly and clearly as if *Dodds* had told him in so many words, 'I withdraw the offer.'"

That statement shows distinctly the view of the Court on this question of fact, and certainly if *Dickinson* knew this as "plainly and clearly" as the Court thinks he did, the decision would seem to be sound.

The language of *Mellish, J.*, is not so clear on this point. He says, if the offeree "receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot."

It is fair to say the case decides only that unequivocal knowledge by the offeree of the offeror's actual change of mind, conclusively shown by his actions, is equivalent to a revocation. *Mellish*, in the language above, speaks of an actual sale, although in *Dickinson v. Dodds* there was merely a prior contract. If A, pending his continued offer to B,

says to a mutual friend C, "I withdraw my offer to B," and C repeats this to B, why is not that a revocation on principle? However that may be, there does not seem to be any warrant for supposing the case raises any doubt as to the quære by Pollock.¹

In *Dunlop v. Higgins* such a quære was suggested, but the case turned on a different point, and no serious thought was given to the subject of revocation.²

In the case of *Shuey v. United States*,³ the United States Supreme Court reached a conclusion which has been subjected to little criticism.⁴ The result of the case on the point of revocation is stated at the end of the opinion. The Court there says: "True, it is found that . . . he (*i. e.* the offeree) was ignorant of the withdrawal; but that was an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made."

In the first place, the manner in which the offer was made was by communication. There was no offer to him until he knew of it. If he ought to know that it could be revoked in the same manner, he ought to know something the Court seems not to know, namely, that it can be revoked in no other manner.

And again, why ought he to know that communication of a revocation is not necessary? If he knows anything about the law, he will be aware that the law as to revocation requires communication, and before this decision he would seem to be justified in the assumption that the Supreme Court would decide according to the rules of law. The Court was possibly influenced by the fact that it might prove difficult to revoke under such circumstances. But what of it?

¹ *Supra*, p. 31.

² *Dickinson v. Dodds* will probably be followed generally in the United States. See *Coleman v. Applegarth*, 68 Md. 21.

³ 92 U. S. 73.

⁴ Pollock says of the case: "Yet it seems a rather strong piece of judicial legislation." Williston's *Wald's Pollock*, p. 23.

Such may prove to be the case with any offer. The offeror ought to think of this when he makes his offer.

It is usually said that an offer does not bind the offeror, and this is true in the sense that he may withdraw the offer by taking proper and timely steps. But it is not true that an offer places no responsibility upon him.

Every one is responsible for his actions, and if he makes an offer he must take the consequences. No matter what diligence he may use in striving to recall such offer, it will not avail unless he actually succeeds in doing what the law requires for a revocation. If after such endeavor he fails, the offer which thus continues may be accepted, and a contract arise in spite of the offeror's efforts. Thus if one makes an offer to another, designating one year as the time it shall continue, and such offeree goes to the wilds of Africa, it may well happen that the offeror may be unable to communicate a change of mind, and a contract arise in spite of attempts to make known such change of intention.

§ 20. ACCEPTANCE

§ 21. (a) Formation of bilateral contracts between parties who are not in each other's presence

The questions involved in the formation of bilateral contracts *inter absentes* have been discussed for many years, and it is still a mooted point when and where such contracts arise, and what is essential thereto. The use of the mails has generally caused these difficulties, and this has sometimes led to the erroneous conclusion that offer and acceptance by mail involve some doctrines *sui generis*, which are to be considered as exceptions to the general rules. But while the most divergent views have been advanced, the law itself, both in England¹ and generally in this country,² may be considered

¹ *Henthorn v. Fraser*, L. R. 2 Ch. 27.

² *Howard v. Daly*, 61 N. Y. 362.

See cases collected in Williston's *Wald's Pollock*, p. 39, n. 42.

as settled,¹ to the effect that when an offer is sent by mail, with no specific directions for forwarding an answer, the contract arises upon mailing a letter of acceptance properly addressed and with postage prepaid. There may be a question whether it does not exist earlier, but at any rate, there is a contract then.

An understanding of the underlying principles applicable to the varying situations which have arisen in this class of cases has been gained slowly, and as in all branches of law, the subject has been thought out gradually. The topic was discussed by the Roman jurists,² has been argued by the continental writers, and was noticed in early English cases.³ In 1818 the question was taken up in *Adams v. Lindsell*,⁴ and later in *Dunlop v. Higgins*.⁵ The discussion was kept up from time to time, and often in cases where the point was not involved.⁶ As was not unnatural, in working out the problem, judges were sometimes puzzled to determine the principles upon which their decisions should be based. Many reasons were advanced which are now recognized as unsound. Thus, the idea that the Government Postal service is an agent; that as the offeree had lost control of his letter he was bound; and other equally mistaken notions.⁷

However, we find the fundamental idea running through the cases that an acceptance need be only a concurrence of

¹ But see *contra*, *Underwood v. Maguire*, Rap. Jud. Quebec, 6 B. R. 237. This case was decided in 1895 by a divided Court. It is not well reasoned and throws no new light upon the subject.

² Puchta-Pandekten, § 251, n. a; Windscheid, Pandekten, § 306; Stabel, *Französisches Civilrecht*, § 136; S. v. F., *Merlin, Repertoire de Jurisprudence*, Tit. Vente, 1, Art. III, No. XI, bis. This case was translated and published in *Langdell's Cases on Contract*, p. 156, and this citation is taken from him.

³ See for a summary of many of the cases, *Williston's Wald's Pollock, Appendix*.

⁴ 1 B. & Ald. 681.

⁵ 1 H. L. C. 381.

⁶ See *Langdell, Contract*, § 14.

⁷ For a refutation of some of these, see *Henthorn v. Fraser*, L. R. 2 Ch. 27.

the minds of the parties upon a distinct proposition, manifested by an overt act.¹

Generally it may be said that acceptance is not appropriately manifested until mailed, deposited with the telegraph company, or started on its suitable course towards the offeror. To write a letter, seal it, and put it in a drawer² would seem to be insufficient. There would not be a suitable manifestation. But suppose in the case of an offer by mail the offeree writes out a proper acceptance, and then reads to several associates in his office the offer and his letter of acceptance. On the strength of this he makes a contract with one of such associates, based upon the proposition contained in the original offer. He then sends the letter of acceptance to be mailed. Suppose further that while his letter is on the way to the post-office, but before it is mailed, a telegram of revocation is received and read by the offeree. It would seem that a contract was made when the letters were read in the office. There was then a suitable manifestation of agreement, and the attempted revocation was too late. Certainly the reasoning in many of the cases warrants that view, and there seems to be no good ground for holding the contrary.

The offer is communicated and agreed to. That gives the requisite *aggregatio mentium*, and it is only on account of the physical necessity that we require more, namely, the suitable outward manifestation.³ In the above supposed case we have this.

¹ *Vassar v. Camp*, 11 N. Y. 441.

See also the opinion of Vredenburg, J., in *Hallock v. Commercial Ins. Co.*, 26 N. J. L. R. 268.

² *Brogden v. Metropolitan Railway Co.*, L. R. 2 App. Cases, 666, 692. But see *infra*, p. 52.

³ Thus in *Hallock v. Commercial Ins. Co.* (26 N. J. L. R. 268, 280 *et seq.*) Vredenburg, J., expresses himself as follows:

"This involves the more general question, does a contract arise when an overt act is done intended to signify the acceptance of a specific proposition, or not until that overt act comes to the knowledge of the proposer? This question may arise upon every mode of negotiating a contract, whether the parties be in each other's presence or not. First comes the

Imagine the following case:¹ A, a deaf man, said to B, "Will you buy my watch for \$25?" B replied: "I will." A did not hear, and asked him to write out the answer. B then wrote, "No, I will not." Or suppose this case: Jones had a phonograph on his desk. Upon leaving his office, he spoke

mental resolve to accept the proposition; but the law can only recognize an overt act. Whether that act be a word spoken, a telegraphic sign, or a letter mailed, some interval of time, more or less appreciable, must intervene between the doing of the act and its coming to the knowledge of the party to whom it is addressed. In the mean time, what is the condition of affairs? Is it a contract or no contract? If the bidder does not see the auctioneer's hammer fall; if the article written for and sent never arrives; if the verbal answer, when the parties are in each other's presence, is in a foreign tongue, or by sudden noise or distraction is not heard; if the telegraphic circuit is broken; if the mail miscarries; if the word spoken or the letter sent is overtaken, and countermanded by the electric current, is there no contract? In the process of the negotiation, at what precise point of time does mind meet mind, does the contract spring into life? . . .

"The meeting of two minds, the *aggregatio mentium* necessary to the constitution of every contract, must take place *eo instanti* with the doing of any overt act intended to signify to the other party the acceptance of the proposition, without regard to when that act comes to the knowledge of the other party; everything else must be question of proof or of the binding force of the contract by matters subsequent. The overt act may be as various as the form and nature of contracts. It may be by the fall of the hammer, by words spoken, by letter, by telegraph, by remitting the article sent for, by mutual signing or by delivery of the paper, and the delivery may be by any act intended to signify that the instrument shall have a present vitality. Whatever the form, the act done is the irrevocable evidence of the *aggregatio mentium*; at that instant the bargaining is struck. . . .

"There is, in fact, no difference between the acceptance of a proposition by word of mouth and a letter stating an acceptance. In the one case it is articulate sounds carried by the air, in the other, written signs carried by mail or by telegraph. The vital question is, was the intention manifested by any overt act, not by what kind of messenger it was sent. The bargain, if ever struck at all, must be *eo instanti* with such overt act. Mailing a letter containing an acceptance, or the instrument itself intended for the other party, is certainly such an act."

In *White v. Corlies*, 46 N. Y. 467, the Court found that there was no definite and determinate outward manifestation of the inner thought. Had the cutting of timber been accompanied with other acts sufficiently indicative of the mind, the conclusion is inevitable that the Court would have found a contract arose thereupon.

¹ See case of *S. v. F., Langdell, Contract*, § 350.

into it an offer to sell his horse to Brown for \$500. Brown, coming in soon after, received the offer from the phonograph and spoke into it an acceptance. Upon leaving the office he changed his mind, and meeting Jones on the street before the latter knew what had taken place, said, "I don't care to buy your horse, and I withdraw the acceptance which I spoke into your phonograph." Or suppose, after Brown has spoken his acceptance into the machine, he changes his mind and smashes the machine.

There would seem to be a contract in all three cases, and this appears to be the legitimate conclusion to be drawn from most of the decisions.

If one sends to a man on the opposite side of the river a letter containing a proposal calling for a counter promise, and says, "Signify your acceptance by lighting a fire," and the offeree does so in such a manner as unequivocally to indicate an intention to accept, surely a contract arises. This would be so even though a fog prevents the fire from being seen.

It is true that thus far we determine only that there is a contract, and before performance can be demanded from the offeror something more must be done in order to comply with the conditions implied from the method of sending the offer. Thus where the offer and acceptance are read to surrounding friends, although the contract arises it is fairly to be implied that mailing a reply promptly is a condition precedent in the contract.¹ Unless this condition happens, the original offeror is not compelled to perform the promise into which his offer has ripened.

Assume in the above illustration that the offeree does not mail the acceptance. The contract has arisen, but the condition precedent is not performed. A condition may be

¹ In discussing *Vassar v. Camp*, 11 N. Y. 441, Professor Langdell says (Contract, § 14): "For assuming that the contract was complete the moment the plaintiff's letter of acceptance was mailed, there is much ground for holding that the defendants' liability was conditional upon their receiving prompt notice of the acceptance of their offer. This view may be fairly rested upon a necessary implication, though it is much aided by expressions in the defendants' offer."

waived.¹ If then the original offeror learns of this transaction, this outward manifestation of acceptance, there seems to be no good reason why he should not hold the other party to the promise.

Another situation is possible: Suppose an offeree mails a suitable letter of acceptance. If, then, the offeree, now acceptor, recalls his letter from the post-office, as he may do in the United States, he thus prevents its receipt by the original offeror, but as the contract has arisen, he cannot by this act affect that result. By a reasonable interpretation of the original offer, there would seem to be not only a condition that the acceptance be mailed, but equally so that it be not interfered with by the acceptor. The same reasoning would apply in the above phonograph illustration, where the acceptor smashes the machine. Thus, although the original offeror would be bound in contract, he would not have to perform his part because of the non-happening of a condition precedent. Whether he could hold the acceptor without performing himself, depends entirely upon the character of the contract. In any case it could certainly be enforced by him according to its terms.

It will be observed that in the case of *MacLay v. Harvey*² there was no appropriate outward manifestation of intent to accept until the postal was mailed. Therefore there

¹ The German Civil Code (Chung Hui Wang's translation) at par. 151 says: "A contract is concluded by the acceptance of an offer, although the acceptance is not communicated to the proposer, if such a communication is not to be expected according to ordinary usage, or if the offeror has waived it. The moment at which the offer ceases to be binding is determined according to the intention of the offeror, to be inferred from the offer or the circumstances."

This language seems to imply that the German codifiers held somewhat the same idea as that indicated in the text. They speak of waiving communication. This indicates that they regard it as in the nature of a condition. There cannot be a waiver of any element of acceptance, but there can be a waiver of a condition found in a contract already in existence, and where such condition would arise by ordinary implication, there would be no difficulty in announcing a waiver in advance, or even indicating that the ordinary condition is not to be implied.

² 90 Ill. 525, discussed *supra*, at p. 18.

was not an acceptance, because, as the Court found, the offer had terminated. Hence, properly, there could not be any question of waiver. But, if there had been such manifestation during the continuance of the offer, the contract would have arisen, and the mailing promptly would have been a condition. In that event, as the action was upon the offeror's promise, the Court would have been right in making the decision turn upon the question whether there was or was not a waiver.

To comply with the condition implied in the offer, prompt steps must be taken towards forwarding the acceptance through the same channel as that selected by the offeror, or one equally expeditious and safe. Where the mail is employed, mercantile usage indicates a reply by mercantile channels, the mail or telegraph, and either will suffice. Special circumstances may vary the implied requirements, as in *Howard v. Daly*.¹

If the telegraph is used by the offeror, the mail being slower, a reply should be by telegram. As the offeror is at liberty to name any condition he pleases, he may require that the answer be received by him, which must be complied with.

The offeror may negative in his offer any of these implied conditions, and then they do not exist and need not be performed.² A publisher writes to a proposed subscriber, "I offer to send you my magazine for one year for \$5.00. I will send you the monthly issues, and I do not ask for a reply. If you accept my proposition, and are willing to promise to pay the \$5.00, write your name on the first three numbers." Should the recipient thus write his name the contract would

¹ 61 N. Y. 362. The offer was sent by mail, but it was found as fact that their custom warranted depositing the acceptance in the general theater letter-box.

² This would be the same as the provision in the German Code (§ 151), given *supra*, p. 39, n. 1.

Illustrations of this may be seen in the offers contained in *Felthouse v. Bindley*, 11 C. B. N. S. 868 (*infra*, p. 46), and in *White v. Corlies*, 46 N. Y. 467.

arise thereupon. The condition ordinarily implied, requiring a reply, would be eliminated by the statement in the offer.

In Massachusetts a rule has developed in this class of cases, which differs from that discussed above, and seems to indicate that no contract arises until the acceptance is mailed, and either received by the offeror, or the time elapsed therefor. The leading case on the subject is *McCulloch v. Eagle Ins. Co.*,¹ where it was decided that there was no contract, on the ground that a proposed revocation was received by the offeree before his acceptance reached the offeror, although after it was mailed. The Court said (at p. 280):

"The offer did not bind the plaintiff until it was accepted, and it could not be accepted to the knowledge of the defendants, until the letter announcing the acceptance was received, or at most until the regular time for its arrival by mail had elapsed."

This case does not indicate that communication, or even receipt of the acceptance, is necessary, for it appears to make the test the regular time for its arrival by mail. It is difficult to find any principle upon which the Court reached its conclusion. However, the case has stood, and has been regarded as establishing in Massachusetts a rule contrary to that of most jurisdictions.

In 1894, Knowlton, J., said in the case of *Bishop v. Eaton*:²

"How far such considerations are applicable to the case of an ordinary contract made by letter, about which some of the earlier decisions are conflicting, we need not consider."

The Court was discussing a question of notice to a guarantor, and the present point was not involved, but the dictum seemed to indicate a possible change of view. It was well known that Judge Holmes³ differed from the views expressed in *McCulloch v. Eagle Ins. Co.* and the case of *Brauer v. Shaw*,⁴ decided in 1897, while not necessarily

¹ 1 Pick. 278.

² 161 Mass. 496, 501.

³ Holmes, *Common Law*, pp. 305-306.

⁴ 168 Mass. 198.

involving the question, suggests the possibility of a change of position in that jurisdiction.¹

In *Brauer v. Shaw*, an offer was sent by telegram from Boston to New York, and duly received. An acceptance was telegraphed in New York at twenty-eight minutes past twelve and was received in Boston at twenty minutes past one. At one o'clock the offerors at Boston telegraphed a revocation. The Court held that a contract arose, and that the attempted revocation was ineffectual because not communicated before acceptance. No question was raised in the case as to whether the New York or the Massachusetts law should prevail,² but as the acceptance was actually received before the revocation was communicated to the offeree, a contract arose under either theory. However, Judge Holmes says, in writing the opinion of the Court:

"There is no doubt that the reply was handed to the telegraph company promptly, and at least it would have been open to the jury to find that the plaintiffs had done all that was necessary on their part to complete the contract. If then, the offer was outstanding when it was accepted, the contract was made."

It is evident from these facts that the Court actually decides nothing more than that a revocation of an offer must be communicated to the offeree, but nevertheless, the case has been regarded as quietly overruling *McCulloch v. Eagle Ins. Co.*,³ and conforming the Massachusetts law to that of the rest of the country.

The question cannot be considered as settled, however, and in view of the influence of Professor Langdell's views,⁴ it may be regarded as uncertain what determination the Court will reach in the future. It seems probable that ultimately the law may be conformed to that of other jurisdictions.

¹ See also *Commonwealth Ins. Co. v. Knabe*, 171 Mass. 265.

² It would seem that New York was *locus contractus* and therefore that New York law should govern as to the formation of the contract. See *supra*, p. 14.

³ *Harriman, Contract* (2d ed.), § 159.

⁴ See opinion in *Lewis v. Browning*, 130 Mass. 173.

The rule adopted by most Courts has been criticised by Professor Langdell.¹ His argument may be summed up thus: The acceptance in a bilateral contract is a counter promise, and as such must first be an offer, and therefore must be communicated. He gives no reason or authority for this analysis, but assumes that it is self-evident.

If this premise be correct, it seems impossible to escape from his conclusion.

It will aid in the consideration of this question to determine what is meant by the term acceptance, in the law of contract, and what are its functions and elements. At the point when an offer is made, the intent and wish of one party, only, is known. In order that a contract should arise, it is evident that the next step must be a manifestation by the offeree that he also wishes the proposed arrangements contained in the offer to ripen into a contract. This manifested assent shows that the parties are of one mind, and that constitutes the agreement, the mutual assent. But it does not follow that to constitute mutual assent there must be knowledge on the part of each that the agreement is reached. Were this essential, it would be necessary to reach the logical but absurd conclusion that the parties could not contract unless in each other's presence, because, where they are not together, it is impossible for each to know that the contract has arisen at the instant it arises. The knowledge of at least one of them must come at a period subsequent to the origin of the contract. This would lead to the endless-chain situation, suggested in the early cases on this subject. For instance, if the contract does not arise until the acceptance is communicated to the offeror, but does at that instant, then the offeree is in ignorance of the fact of communication to the offeror, *i. e.*, the contract would arise without his knowledge. There would seem to be no doubt that an acceptance as such, and containing no other element, requires no communication.

Take the familiar case of a unilateral contract, and suppose

¹ Contract, § 33.

a householder descending his front stoop, some snowy morning, and seeing a man with a snow shovel going by, calls out, "Clear my sidewalk and I will give you fifty cents," and then hurries off down town before the shovel man makes reply. The man, however, does shovel off the snow in pursuance of this offer. No one can doubt that a contract arises as soon as the act is completed, and yet the householder, the offeror, is down town, and neither has the acceptance been communicated to him, nor does he know that the contract has arisen. There is a contract without such communication or knowledge.

But, it is truly said, where an offer contemplates mutual promises, in other words a bilateral contract, the acceptance contains the further element of a counter promise on the part of the offeree. In such a case, the mere acceptance, unless it contains a promise directly or by implication, is not enough, any more than it would be in the case of a proposed unilateral contract, because in a bilateral contract the counter promise is requisite to furnish the consideration for the promise into which the original offer ripens. If this counter promise must be first an offer, then certainly communication is necessary, because, as said above,¹ *ex vi termini*, an offer implies communication, and Langdell's contention would appear to be irrefutable. But there is no quality in a promise which necessitates its being first an offer. It is true that we often do have an offer which subsequently ripens into a promise, but because some promises are first offers, it by no means follows that all promises must go through this process. Nor does there appear to be any special reason for so holding in the case of a proposed bilateral contract.

This leads to the next question, which is, must a promise, as such, be brought to the knowledge of the promisee?² It is difficult to find any element in a promise which requires such communication. Suppose that a publisher sends a book to

¹ See *supra*, p. 13.

² Judge Holmes believes not. See Holmes, Common Law, pp. 305, 306.

some one with a statement that the price is ten dollars, and he hopes the recipient will purchase it. Suppose, further, that upon receipt of the book the proposed purchaser decides to buy, and appropriates the book by unmistakable acts. Is there not an implied promise to pay the price — not a so-called promise implied in law, a quasi-contract, — but a true promise implied in fact from the act of appropriation? No good reason appears for holding that this is not a promise, and yet the publisher may, and probably will be, ignorant of this implied promise at the time it is made. It may be urged that debt would lie for the price of the book, but this does not preclude special assumpsit. In *Fogg v. Portsmouth Athenæum*,¹ it seems clear that a promise arose upon the appropriation of the newspapers, although the publisher may have known nothing about it. There the publisher sent his newspaper to a public library under circumstances which the Court rightly held did not constitute an express contract. The library company appropriated and used the papers after being apprised that they were not intended as a gift. The Court held the library company liable, although the opinion does not make it clear whether they decided upon the theory of quasi-contract or of a true contract implied in fact.

There is no sufficient reason for maintaining that the obligation in these cases is quasi-contractual, because the offeree reasonably indicates an agreement, and thus supplies the characteristic of a true contract. An obligation can arise in tort without any communication to the one wronged, and why not in contract? Once find mutual assent with consideration, and the elements of contract exist. Thus when the act is tendered for a desired promise and appropriately received, the consideration is furnished and the promise indicated by accepting the act. There is no necessity for communicating this to the promisee. Suppose an offer contemplating a bilateral contract to be sent by mail. The first offer becomes a promise when the consideration, the counter promise, is

¹ 44 N. H. 115.

furnished. But if it be held that this counter proposition must be communicated to become a promise, then we seem forced to the conclusion that the first offer cannot ripen into a promise until again communicated as such promise. That is to say, when first communicated to the offeree it is merely an offer, and cannot become a promise until the counter promise is communicated to the offeror, but at that time the first promise, as a promise, is not communicated to the original offeree. It cannot be said, properly, that the communication of the first offer suffices for the subsequent promise into which it is to ripen. If there is any element of a promise which, as such, requires communication, the conclusion must be reached that communication of the offer will not meet the requirement for the subsequent promise. In other words, here also we seem to have the problem of an endless chain. Langdell does not encounter this difficulty, because his only claim is that the counter proposition is an offer. But it would seem that he must necessarily have conceded that the promise arising from the first offer need not be communicated. If we agree that the counter proposition need not be an offer first, then it is logical to hold that it is a promise as soon as made manifest.

In the case of *Felthouse v. Bindley*,¹ Paul Felthouse, after previous negotiations, made an offer by letter to his nephew, John, for the purchase of a horse. This letter terminated with the words, "If I hear no more about him, I consider the horse as mine at £30 15/." No reply was made to the offer, and the words quoted indicate that no reply was necessary. If the nephew, John, had shown at once by distinct overt acts that he accepted the offer, it would seem that on principle a contract would have arisen then and there. As it was, however, the uncle's offer was made on January 2d, and there is nothing in the facts given to show that the nephew indicated any intention to accept until February 26th, at which time the uncle's offer would certainly have expired by reasonable limitation. It would be immaterial

¹ 11 C. B. N. S. 868.

that the uncle by unevinced mental determination may have been satisfied to continue his offer. Therefore no contract arose.

In *White v. Corlies*,¹ the defendants wrote to the plaintiff, a carpenter, directing him to proceed at once to fit up their office. There is room for doubt as to what this letter really meant, but the Court regards it as an offer. The plaintiff immediately purchased lumber, and began work thereon.

Whether plaintiff's conduct was sufficiently indicative of his state of mind, a sufficient outward manifestation of his inner intent to accept, was a question of fact. The Court decided this question in the negative, and hence there was no mutual assent from the legal standpoint.

It is evident, from the reasoning of the Court, that if the plaintiff had evinced his intention to accept by clear and unmistakable overt acts, a contract would have arisen without further communication. The Court treats the offer as calling for a bilateral contract. Otherwise the short answer to the plaintiff would have been, "You have not furnished the consideration."

The question of counter communication has been discussed in many cases where the point was not necessarily involved. Thus in *Adams v. Lindsell*,² the acceptance was actually received. There was no revocation, and hence it made no difference whether the contract arose at the mailing or upon receipt of the acceptance. The same was true of *Dunlop v. Higgins*.³

These cases really stand for the proposition that where an offeror makes use of the mails he indicates reasonably that ordinary and usual delays are expected. Thus in sending his offer he expects naturally that it will reach the offeree in the ordinary time, allowing for usual delays, and upon receipt of such letter the offer is made. The time of trans-

¹ 46 N. Y. 467. And see *supra*, p. 36.

² 1 Barn. & Ald. 681.

³ 1 H. L. C. 381.

mission in *Adams v. Lindsell*¹ was not unreasonable or unusual.

*Mactier v. Frith*² is generally cited as an authority on the subject of contract made by use of the mails. The point was not involved, and the Court was wrong in finding a contract, although the actual decision seems to be right on the ground that there was a transfer of title to the brandy in question.³

Frith having submitted an offer to Mactier for the modification of an existing contract, the latter wrote neither accepting nor refusing, but asking, practically, that the offer be continued. Frith answered acknowledging the receipt of this letter, but inadvertently omitted any mention of the offer. Some time later Mactier wrote, attempting to accept, and about the same time Frith also sent a letter containing a renewal of his offer. These letters crossed on the way. Mactier died before either reached its destination. Therefore the point of contract depends upon the answer to the question whether Frith, by his unevincd determination, could continue his offer. Otherwise there was no offer existing at the time Mactier attempted to accept. Continuing an offer is simply making a new offer containing the same terms as the old. It requires communication for the same reason which applies to the original offer.

§ 22. (b) Allotment and guaranty cases

These cases are different in character from those just discussed. The failure to notice this has done much to cause confusion. It is evident that the offers in these cases call for an act, and hence contemplate a unilateral contract.⁴ As the performance of the act is not readily ascertainable by the offeror, there is an implied condition precedent to his promise that the promisee shall take reasonable pains to give him

¹ 1 Barn. & Ald. 681.

² 6 Wend. 103.

³ Langdell, *Contract*, § 14.

⁴ *Idem*, § 7. See *infra*, p. 177, title conditions implied in fact.

notice. Mailing a letter of notification complies with this condition, whether the letter is received or not.

Thus in the allotment cases, the directors are asked to allot stock to the offeror. When they perform that act he becomes a stockholder, and the consideration asked for has been given. The contract arises at that instant, and the condition requiring reasonable effort to notify is then implied in the contract. *Household Fire Ins. Co. v. Grant*¹ is a case of this sort. The Court treats it, however, as an instance of proposed bilateral contract, and taking *Dunlop v. Higgins*² as in point, and conclusive, decides that a contract arose upon mailing. *Bishop v. Eaton*³ was a case of guaranty. The offer called for an act. *Knowlton J.*, says (at p. 499):

"But this was not a proposition which was to become a contract only upon the giving of a promise for the promise, and it was not necessary that the plaintiff should accept it in words, or promise to do anything before acting upon it. It was an offer which was to become effective as a contract upon the doing of the act referred to. It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer and furnished the consideration."

In the case of *In re London & Northern Bank—Ex parte Jones*,⁴ stock was allotted, and a letter of notification promptly forwarded. But as this letter was handed to a postman, and not deposited in the post office by the company, the Court found that under the English postal regulations⁵ it was not duly mailed, and hence that no contract would arise until its receipt. In the meantime a revocation was received by the company at an hour prior to that at which the Court concluded that the notification was received. It was held no contract arose, and Jones was granted the relief he sought, which was repayment of his advance, and removal of his name from the list of stockholders.

¹ L. R. 4 Ex. Div. 216.

² 1 H. L. C. 381.

³ 161 Mass. 496.

⁴ 1 Ch. 220.

⁵ The postal laws in the United States are different in this respect.

The decision is in conflict with the views above expressed, and is believed to be wrong. It is not a case of proposed bilateral contract, and hence the contract arose upon the allotment. It may be that the condition precedent to Jones' promise had not been performed owing to the defective mailing, but that would only serve as a defense in case he should be called upon to pay more, and did not entitle him to demand his money back. There was a contract, and Jones received what he asked for. If he desired to proceed he could do so, or if he wished to drop the matter he could defend against any further demands, but he had no right to have his deposit repaid, nor his name removed.

Professor Langdell calls attention¹ to a difficulty in cases of this character. When the offer calls for the transfer of property, or the allotment of stock, and the act requested is given, unless the condition precedent of sending notification takes place, the promisor obtains the right or property without payment. He suggests that the rights under the allotment or the title to property is suspended until notice is sent, but that such rights or title then relate back to the time of transfer or of allotment. This is a fiction pure and simple, and instead of meeting the difficulty, adds to the confusion. In the allotment case there is no question of passing title. The offeror asks for a specific act, namely, to be made a stockholder, not a conditional stockholder, if such a thing were possible. If the act requested is not given, there is no contract. If the allotment is made, then the applicant is thereby a stockholder with full rights, and it is not easy to understand on what theory these rights can be suspended. Where there is a transfer of title to property, perhaps the person transferring may have a vendor's lien for the payment, but in the case of allotment the promisor is given a status immediately, and the rights spring up at once. The delivering of stock certificates later, would merely operate as proof that he is a stockholder, but the allotment gives him his rights. Possibly the company could withhold the certificates until

¹ Contract, § 6.

payment, but that is doubtful. A conditional obligation has been delivered to the company in payment for the allotment. How can its neglect to perform the condition take from the subscriber the rights for which he has thus paid? Such a result does not seem sound. The correct conclusion seems to be that a company which thus enters a conditional contract, must take the risks ordinarily incident thereto, and perform the condition at its peril. The risk can be avoided by a refusal to accept the offer, and insisting upon a different contract.

Difficulties are met in any attempt to answer satisfactorily all questions involved in the origin of contracts *inter absentes*. Perhaps Langdell's ideas are the simplest, and they have the advantage of easy application. But the Courts have generally taken a different view, and consequently in most jurisdictions the law is not in accord with Langdell's theory. Further there does not seem to be warrant for his position either on logical or practical grounds. He states his proposition as though it were self-evident that a promise must be first an offer, but the reason or necessity for this analysis is not apparent.

The Courts have not proceeded upon a definite principle, and any generalization from the varying views expressed brings out new problems. Where shall the line be drawn between Langdell's position and the possible contention that unevincemental determination is enough? The latter view is universally rejected by the Courts, and yet they give very little sound reason for so doing. In lieu of argument they frequently satisfy themselves with the rather specious quotation, "It is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is."¹

Why is the manifestation by overt act essential? Agreement exists upon the concurrence of the minds on a distinct proposition. Is the reason for requiring manifestation that

¹ Quoted from Brian, C. J., by Lord Blackburn in *Brogden v. Metropolitan Railway Co.*, 2 App. Cas. 666, 692.

"the thought of man is not triable"? But this is not true. Thus, intent in a question of domicile is certainly triable.

In *White v. Corlies*¹ the Court found that the plaintiff carpenter had not sufficiently indicated his state of mind by simply buying and cutting timber. It does not appear that any evidence was given on the trial as to the carpenter's intent in doing these acts, and the trial court might have excluded such testimony, if offered, on the ground that intent, unaccompanied by sufficient outward manifestation, was immaterial. However, as the plaintiff won in the lower courts, we know that they must have thought the outward manifestation sufficiently indicative, and under such circumstances there would be no sound reason for excluding the testimony. As intent is the point to be proved, it would be strange that such direct proof as the actual testimony of the person himself, should be incompetent. If the Court of Appeals should have before it the inconclusive fact of buying timber, coupled with plaintiff's own testimony that he did this with intent to accept, there would seem to be no reason why they should reverse, and not allow the finding of the jury to stand. In these instances it would seem that the inner thought is in reality "triable."

The Court might have concluded that while there was a contract the actual manifestation was insufficient to comply with the implied condition precedent. But this point was not considered.

Langdell² says: "In truth, mental acts or acts of the will are not material out of which promises are made." And this is quoted with approval by Pollock.³

But what basis is there for saying that the formal overt act is of such magical effect that for and of itself it is essential without any reference to its requirement on the ground of necessity? In reality, agreement is the fundamental element, and the physical manifestation is simply demanded

¹ 46 N. Y. 467. See *supra*, p. 36.

² Contract, § 180.

³ Williston's *Wald's* Pollock, p. 5.

because it has been supposed that it is not practicable to do without it.¹

Granting that physical necessity requires as a practicable and workable rule some outward manifestation of the concurrence of the minds, what is requisite for such manifestation?

Suppose upon the receipt of the offer the facial expression of the offeree indicates an inner determination to accept. This would be some outward manifestation of inner intent and might be more indicative than the cutting of the timber in *White v. Corlies*.² This would seem to meet the supposed difficulty as to proof.

In the preceding discussion³ it is assumed that when an offer is made by mail, it is not a sufficient outward manifestation to write a letter of acceptance and place it at once in one's drawer, but that the overt act must be of such a character as to make it possible for notice thereof to reach the offeror in some way. It is not apparent why this is essential to the juristic idea of mutual assent. Causing a contract to arise beyond the possibility of revocation, with the performance of subsequent acts as conditions required in a contract already in existence, would meet all objections.

These conditions meet the requirements of the offeror, and sufficiently protect him. Should a man mentally assent, but by error send an acceptance which unintentionally varied the terms of the offer, we should have an overt act in conflict with the real intent. The act should be recognized, because the offeror would be estopped from telling the truth about it, as in other instances of *estoppel in pais*.

¹ Imagine omniscient beings who could read each others' thoughts, or such a universal spread of mental telepathy that ordinary mortals could do the same thing. Surely the requirement of an overt act would cease. If mental assent were enough, all requirements as to outward manifestations would be merely conditions in a contract already existing.

Singularly enough, Langdell uses this language: "The acceptance of an offer, however, differs from the making of an offer. The former requires, it seems, a mental act only; and clearly it does not, like the making of an offer, require a communication from the person making it, to the person to whom it is made." Contract, § 2.

² 46 N. Y. 467, *supra*, pp. 47, 52.

³ *Supra*, p. 36.

We must, of course, meet the practical necessities of any given case. Law exists to regulate the every-day life of human beings, and must be adapted to their needs. But in recognizing these needs we should not fail to point out that certain existing requirements are not essential to the fundamental ideas involved, and when by modern discoveries, in any given case, the former necessity ceases, the requirement can be dropped without any interference with the essentials of the rule itself.¹

§ 23. (c) **When an offer is made through the mail, an acceptance may be forwarded in the same manner, or through any other customary mercantile channel equally expeditious**²

The method of transmitting the offer indicates by reasonable implication the means of reply to be used by the offeree. No slower channel of communication may be selected. If any other mode than that impliedly indicated is employed, the offeree would seem to use such means at his peril. If his reply is duly received, it is sufficient, but not if lost or delayed. It is a question of fact as to what is implied, and whether there has been a compliance therewith.³ When the mail is used the answer must be properly addressed, and forwarding charges prepaid.

¹ Thus in *Stoddard v. Ham*, 129 Mass. 383, 385, the Court says: "It is elementary in the law governing contracts of sale and all other contracts, that the agreement is to be ascertained exclusively from the conduct of the parties and the language used when it is made, as applied to the subject matter and to known usages. The assent must be mutual, and the assent of minds is ascertained by some medium of communication."

This undoubtedly expresses the view generally entertained. The remark was not essential to the case, and it will be noticed that the Court merely assumes the position as a matter of course without reasoning. The language is not necessarily in conflict with the views suggested above.

See also *O'Donnell v. Clinton*, 129 Mass. 383.

² *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380; *Wilcox v. Cline*, 70 Mich. 517; *Stevenson, Jaques & Co. v. McLean*, 5 L. B. Div. 346 (where offer was by mail and acceptance by telegram); *Trevor v. Wood*, 36 N. Y. 306.

³ *Henthorn v. Fraser*, 2 Ch. 27.

§ 24. NEITHER OFFER NOR ACCEPTANCE MAY BE INFERRED FROM SILENCE ALONE. NO ONE CAN COMPEL ANOTHER TO REPLY, AT THE PERIL OF A CONTRACT IF HE REMAINS SILENT

Suppose a newspaper manager mails a number of his paper to some one in his town, with a letter to the effect that unless he hears from him to the contrary, he will put his name down as a subscriber, terms \$3 per year.

Hearing nothing, he continues to forward the paper regularly, and at the end of the year sends a bill. Upon this state of facts there is no contract, as a reply cannot be compelled, and mere silence is not an acceptance. The recipient might indicate by his actions an intent to contract, but in each instance it is a question of fact whether such intent can be inferred reasonably.

Suppose an original subscription for one year, and without renewal the paper sent regularly for another year, but not used. Clearly there is no contract for the second year.¹ The first contract terminated at the expiration of the first year, and there was nothing on which to base a second. But suppose under such circumstances the subscriber pays at the end of the second and third years. If the manager continues to send the paper for the fourth or subsequent years, there is a bilateral contract, because then the subscriber by his action is making a standing offer, which the manager accepts. It is incumbent upon the subscriber to revoke if he does not wish a further contract to arise. Taking and paying for the paper two or three years, reasonably indicates the intent to make such standing offer.

In *Hobbs v. Massasoit Whip Co.*,² eelskins had been sent to the defendant several times, retained and paid for. Finally skins were sent, retained by the defendant, and accidentally destroyed by fire. The Court found that even though

¹ *Realty Records Co. v. Pierson*, 116 N. Y. Supp. 547.

² 158 Mass. 194.

the eelskins did not conform to the requirement of the defendant, yet silence, coupled with retention of the skins for an unreasonable time, warranted the plaintiff in assuming an acceptance.

The law is stated clearly, and the opinion shows forcefully, that mere silence does not constitute acceptance. The previous dealings of the parties justified the view that an acceptance was indicated. It seems probable that there was a standing offer, and then it would resemble the case, supposed above, of a man paying for his paper for years.

The mere fact that one sees another doing work for him and remains silent, does not necessarily indicate that he has requested the work. Without such request expressly made, or fairly to be implied from the facts, he is not liable therefor. He has neither made nor accepted an offer.

A jury may be justified in inferring a previous request¹ in some cases, although there is no direct testimony to that effect. They may refuse so to infer, and should do so unless they are convinced there was something more than mere silence. This is shown in the illustration given by Devens, J., in *Day v. Caton*,² where he says:

"If a person saw day after day a laborer at work in his field doing services, which must of necessity inure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit, and with the expectation of

¹ As to effect of request, see *infra*, p. 121.

² 119 Mass. 513, 516.

payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury, and to them it was properly submitted in the case before us by the presiding judge."

Clearly it would be material evidence if the person should testify that although he did see the laborer, as described, he never directly or indirectly asked him to work, or did anything beside remain silent. A laborer who went into the field without any request or suggestion, could not in that way compel the owner to speak to him at the peril of having a contract forced upon him. Suppose on a summer morning a person sits writing on his front porch in a country village. There is a convention of painters, and one of them going by with his paint pot, offers to paint the front fence for \$25. The owner declines. Successively and in ignorance of the other offers, five more make the same proposition. At last the writer losing patience, pays no further attention to them, and the sixth paints the fence. There is no acceptance of the offer, express or implied, and hence no contract.¹ In the case of the laborer in the field, the jury may infer the request, because it is difficult to conceive of an instance where a man would do this without some authorization from the owner. But if it be admitted that there was no request, the jury ought to be directed to find a verdict for the defendant.

§ 25. THE SENDER OF A TELEGRAM CONTRACTS WITH THE COMPANY. NEGLIGENCE IN DELIVERY OF A FALSE MESSAGE IS A TORT BY THE COMPANY

When a person sends a telegram, he contracts with the telegraph company to forward his message. The company is not in any true sense his agent. Should the company negligently

¹ Aside from principle and logic, any other conclusion would lead to an obvious absurdity. If the writer must reply to one painter, he must do the same to five thousand, and thus, possibly, be forced to give up the use of his porch.

*deliver a wrong message, thereby causing injury to the recipient, such recipient has no ground of action on contract, either against the company or the person sending the message. He should be allowed an action in tort against the company.*¹

The above statement is believed to be sound on principle, but the cases have not been consistent, and several of them have been decided upon a different theory. The Courts were in doubt for some time as to the principles involved, and did not analyze the facts correctly.

In *Ayer v. Telegraph Co.*² the defendant received for transmission a message containing an offer of sale. Through its negligence the message as delivered stated a lower price than that named in the original. The recipient replied that he accepted the offer. Upon the mistake being discovered, the sender of the dispatch furnished the goods at the price named in the incorrect message. He then sued the company for breach of contract, claiming as the measure of damages the amount he had lost by thus supplying his goods. The Court allowed this claim, apparently upon the theory that there was a contract to furnish the goods at the lower price. This is clearly wrong, and cannot be sustained on any theory. Even if it were true that the telegraph company is in any sense an agent, it certainly has no authority to do anything but deliver the message sent. The offer contemplated was never made, and the company had no authority, express or implied, to make any other. Hence, as there was no offer, there could be no acceptance, and no contract. It follows that the loss incurred by the plaintiff was entirely voluntary, and hence not recoverable.

The recipient of a false message, due to the negligence of the telegraph company, should have an action of tort against the company for the loss occasioned by its breach of a public duty.³ A recovery, seemingly on the ground of

¹ *Shingleu v. W. U. T. Co.*, 72 Miss. 1030; Bigelow on Torts (8th ed.), p. 130.

² 79 Me. 493.

³ *Shingleu v. W. U. Tel. Co.*, 72 Miss. 1030; Bigelow on Torts (8th ed.), p. 130.

tort, was allowed in the case of *N. Y. & W. Tel. Co. v. Dryburg*,¹ where an order by telegraph for "one hand bouquet" was read by the receiving operator as one "hund" and written out in the message delivered as one "hundred." The florist was allowed to recover his damages from the company.

In a recent telegraph case,² the New York Court of Appeals reached a singular conclusion. The plaintiffs, pursuant to an inquiry from Chicago, requested a concern in North Carolina to send them by wire the price of certain cotton goods. They received through the defendant company a telegram purporting to give such price. They then telegraphed an offer to the Chicago parties based upon the price thus given to them. This offer was accepted. It developed that the North Carolina message, as delivered by the defendant company, stated a lower figure than was written by the sender. The plaintiffs were bound by their Chicago contract, and thus were caused a loss by the false message. They sued the defendant upon the theory of tort arising from its breach of duty. The sender of the message wrote upon the usual telegraph blank which contained the customary exemption clauses.

One would suppose that any contract with the defendant company was made by the sender in North Carolina, and that he alone was bound by the exemptions. But the New York Court took the peculiar view that the sender acted as agent for the plaintiffs in sending the message, and as such agent made the contract on behalf of the plaintiffs, who were thus bound by the limitations on the telegraph blank. Upon this ground the Court held that plaintiffs could not recover.

The Court of Appeals evidently believed that the telegraph company was not guilty of negligence, but as they were concluded by the findings of fact below, could not base their decision on that ground, and therefore invented this

¹ 35 Pa. St. 298.

² *Halstead v. Postal Telegraph Cable Co.*, 193 N. Y. 293.

elaborate fiction. The decision may commend itself on the ground of ingenuity, but hardly as being sound.

§ 26. THE DOCTRINE OF ESTOPPEL IN ITS APPLICATION TO THE FORMATION AND PERFORMANCE OF CONTRACT

It is generally believed that estoppel plays little or no part in the formation of contract. When we are treating of the elements of contract, the doctrine, if applied, would seem to change positive rules of law. In some instances this is really done, but by a nice use of language we avoid the shock to our legal sense.

Thus as to agreement, which is the fundamental characteristic of contract, we do not say "that the law does not require contracting parties to have a common intention, but only to seem to have one." This statement is too revolutionary, but we may put it thus: "The law does not require the wills of the parties to be as one, but that when men present all the phenomena of agreement they are not allowed to say that they were not agreed."¹ We can thus save admitting any exception to our rule, and at the same time avoid the word "estoppel," with the dangerous element which the doctrine might introduce.

But what good reason can we assign for not applying the doctrine of estoppel whenever occasion calls for it, either in the formation of contract, or after it has arisen? The great bugbear seems to be that it may cause lack of mutuality, an objection which seems invalid. There are many cases where this doctrine ought to be applied by the Courts, and probably would be. Thus a man receives an offer calling for a bilateral contract. He materially varies the terms of the offer in his proposed acceptance, and thus rejects the offer and makes a counter offer. This rejection or counter offer can have no effect until it is actually communicated. Before this happens he mails a suitable ac-

¹ Anson (Huffcut's 2d ed.), p. 10.

ceptance. In most jurisdictions this would constitute a contract. The counter offer, being mailed first, reaches the offeror before the acceptance, and relying upon it as a rejection he promptly makes other plans. It will cause him serious loss if this rejection is of no effect, and he be held to the contract. Or suppose the offeree in the above case telegraphs a rejection immediately after mailing an acceptance, and the offeror acts upon it, to his loss — shall the offeree be permitted to claim a contract in spite of his action indicating the contrary? Or suppose the offeree mails his acceptance and at once takes a train to the house of the offeror, meets him, and says, "I reject that offer of yours." Does not estoppel work in that case? The offeror upon discovering the facts in all these cases may claim a contract, and indeed there is one in fact, but is not the offeree prevented, at the option of the offeror, from showing the actual fact? It is true that there would not be mutuality in these cases, but what of it? The general doctrine should give way, when other special principles call for a modification of the rule.

In *Patrick v. Bowman*,¹ the Court, after holding that a revocation of an offer not received before acceptance was ineffectual, said: "There is indeed, in a case of this kind, some reason for urging that the party making the revocation should be estopped to claim that his attempted withdrawal was not binding upon himself; but this could not be done without infringing upon the inexorable rule that one party to a contract cannot be bound unless the other be also, notwithstanding that the principle of mutuality thus applied may enable a party to take advantage of his own act."

But is there an inexorable rule? In *Eliason v. Henshaw*,² the Court says: "But an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming part of their proposal, imposed no obligations

¹ 149 U. S. 411, 424.

² 4 Wheat. 225, 227.

binding upon them, unless they had acquiesced in it, which they declined doing." Where does this suggestion leave the question of mutuality? The Court indicates that the plaintiff had the option to acquiesce or not, that is, to be bound or not as he pleased.

An infant may enter into a bilateral contract, and in that case the adult is bound, but not the infant. One falsely representing himself as the agent of another may pretend to make a bilateral contract with a third person in the name of his alleged principal. The supposed principal may ratify this arrangement, in which case we have a contract existing from the moment it was made by his alleged agent. During the reasonable time pending ratification or repudiation by the possible principal, the third person is bound, for he certainly cannot withdraw. Pending such reasonable time, the possible principal is free to ratify or not as he pleases. There is no such mutuality in any of these examples as is said to be inexorably necessary. These illustrations affect the origin of contract, and hence are directly in point:

Another instance is found when a man acts in such a way as to deceive another and make him believe that his offer calling for a counter promise is accepted. The offeree does not intend to accept, and if there is a contract it must be based upon estoppel. There is no actual assent, but the offeree is not allowed to deny the apparent consent indicated by his action. In other words, he is estopped to deny his assent. But the estoppel can bind only the one who has thus acted, it cannot constrain the other, who must be able to show that there was no actual assent, and so no contract. The party estopped is bound by a bilateral contract, if the other desires to hold him, but surely such other is at liberty to deny the mutual assent, in spite of the lack of mutuality thereby caused.

In contracts where one of the promises depends upon an event which has already happened, but which is subjectively uncertain to the parties, as matter of fact one of them is never bound to anything, and in reality there is no mutual-

ity. Langdell¹ would hold that there is no contract at all, but the Courts have decided that there is, and it would seem that they are right.²

The rules of contract may be consistently worked out, even though the doctrine of estoppel is allowed as a qualification in some instances. As matter of law it is already applied in several situations, and there seems no good reason for limiting its operation on account of a supposed necessity arising from the general requirements of mutuality.

§ 27. CASES INVOLVING QUESTIONS OF OFFER AND ACCEPTANCE

The famous case of *Cooke v. Oxley*,³ decided in 1790, has been generally considered wrong until the suggestion was made that it really turned on a point of pleading.⁴ Negotiations having taken place concerning the sale of tobacco, Oxley offered to sell at a price named, and agreed that his offer should remain open until 4 P. M. of that day. The declaration averred acceptance before 4 P. M. The Court held that there was no contract. They did not at that time perceive that an offer could continue after the parties separated, and as there was clearly no contract at the first interview, that seemed to end the matter. There is no pretense of any revocation, and although there was no allegation that the offer did remain open, yet that should be presumed, there being nothing shown to the contrary. On such facts a contract would be found to-day.

Auction sales. The leading case of *Payne v. Cave*⁵ is a decision upon an auction sale. In that case a bid was made from the floor, but the auctioneer did not drop the hammer, and the Court held there was no contract. The theory is

¹ Contract, §§ 28, 89.

² Holmes, Common Law, p. 304.

³ 3 T. R. 653.

⁴ See Benjamin on Sales, § 65; Langdell, Contract, § 182.

⁵ 3 T. R. 148.

that the offer comes from the floor when a bid is made, and the dropping of the hammer is an acceptance. Langdell¹ preferred the view that the auctioneer makes the offer to be accepted by the highest bidder. However, *Payne v. Cave* has continued to represent the law both in England and this country.²

Warlow v. Harrison,³ decided in England in 1859, was an auction sale of a horse advertised "without reserve." The Court recognized the meaning of these words to be that the sale was to be made to the highest *bona fide* bidder. The owner bid in the horse, and the plaintiff brought his action for breach of contract. On the authority of *Payne v. Cave*, the Court of Queen's Bench decided that there was no contract, but this was reversed by the Exchequer Chamber, Martin, B., writing the opinion and deciding for plaintiff, on the ground that there was an offer by the auctioneer accepted by the highest *bona fide* bidder.

The decision⁴ cannot be reconciled with *Payne v. Cave*. If the offer comes from the bidder, then of course there can be no contract until the auctioneer accepts by dropping the hammer. On that theory the auctioneer cannot be bound by the words "without reserve," as there is no contract until the hammer falls. But on the theory of the Exchequer Chamber, the offer comes from the auctioneer, and the acceptance from the highest bidder. There is no distinction on principle, and either one case or the other must be wrong.⁵

¹ Contract, § 19.

² For a singular suggestion, see Harriman, Contract (2d ed.), § 53. This seems objectionable, because it is based upon a pure fiction and for other reasons. The German Civil Code, § 156, provides that a contract is concluded by the falling of the hammer.

³ 1 El. & El. 295, 309.

⁴ It is disapproved by Pollock. See Williston's *Wald's Pollock*, p. 18.

⁵ In *Taylor v. Harnett*, 55 N. Y. Supp. 988, there was an auction sale "without reserve." The Court discusses *Warlow v. Harrison*, and considers the question an open one. The case holds that there was no contract, and hence the auctioneer was not bound by the words "without reserve." There was no clear discussion of the underlying principles involved.

II. CONSIDERATION

§ 28. IN GENERAL

The doctrine of consideration in contract is peculiar to jurisdictions where the English common law prevails.

In early times a simple promise established no obligation. Later such promises began to be enforced in cases where a breach would amount to a betrayal of confidence.¹ These were instances of wrongful action to the person or property of another by one to whom they had been entrusted and who "assumed" to use skill and care. The obligation was based on tort, but the *assumpsit* by defendant was essential. Following the thread through the actions of detinue, trespass on the case, action on the case for deceit and debt, we come to a time when the defense of *wager of law* became unsatisfactory to many, and this led to the introduction of *assumpsit*.

With the advantage of trial by jury this action progressed rapidly. Through its history is to be traced the growth of the modern consensual contract. The doctrine of consideration developed with the action of special *assumpsit*.²

Until recent times it has been erroneously believed that the roots of the conception of consideration were to be found in the Roman law, and our books are filled with such words as "*causa*," "*nudum pactum*," and the like. Thus "*nudum pactum*" is supposed to indicate a contract without consideration, whereas by its use the Romans described an obligation which arose without the usual formalities, naked, because not dressed with the usual forms.³

Consideration is something furnished to the promisor at

¹ The earlier cases are found in the Year Books, such as that of a ferryman through whose negligence a horse was drowned which he was taking across the river. Injury to persons or animals through the negligence of surgeons, and instances of a similar character.

² For the history of *assumpsit*, see Ames, "History of *Assumpsit*," 2 Harv. L. Rev. 1, 53; Holmes, *Common Law*, pp. 245, 288; Anson on Contract (Huffcut's 2d ed.), pp. 60-65; Martin, *Civil Procedure at Common Law*, §§ 51-55.

³ Pollock & Maitland, *Hist. Eng. Law*, p. 192

his request and in exchange for his promise. It must have some value, however slight, and may be something actually given to the promisor, or it may be doing, or refraining from doing, something by the promisee. The consideration must be that which the offer has called for.¹ As it is given in exchange for the promise, it necessarily follows that they must be contemporaneous. In other words, the consideration must not be "past."

For a long time it was thought that there must be some benefit conferred upon the promisor. Gradually this ceased to be required, and detriment to the promisee became the test.²

¹ Suppose the offer calls for nine cents. The request may be for the act of paying nine cents either to the offeror or to a third person, or it may be for a promise to pay nine cents. In the first case the payment must be made to the offeror. If he is tendered ten cents and accepts it there is a contract, but not pursuant to the original offer. The offeror acquiesces in the changed amount, and thereby impliedly makes a promise in the same terms as the original offer. In other words, the original offer is done away with, and new terms agreed upon. In the second case, — it depends upon the construction to be put upon the offer. If it be construed as calling for an amount not less than nine cents, if that is simply a minimum, then payment of ten cents to a third person will meet the requirement, but if the construction be that the precise amount of nine cents is called for, payment of ten cents will not be enough. It may well be that the offeror is opposed to having ten cents given. The third case calls for a promise to pay nine cents. This promise can be performed by the payment of nine cents and nothing else. The payment of nine cents is a condition precedent to the promise of the original offeror, and unless this is waived, as for instance by receiving ten cents, or it is found that the breach does not go to the essence, performance of this condition can be made only by tendering the precise amount, no more and no less. *Brown v. Norton*, 50 Hun, 248.

See *infra*, on conditions, Chap. II.

² "In truth, however, benefit to the promisor is irrelevant to the question whether a given thing can be made the consideration of a promise, though it may be very material to the question whether it is made so in fact. There may be a clear benefit to the promisor, and yet no consideration, *e. g.*, where the benefit does not come from the promisee. On the other hand, detriment to the promisee is a universal test of the efficiency of consideration; *i. e.*, every consideration must possess this quality and possessing this quality, it is immaterial whether it is a benefit to the promisor or not." Langdell, *Contract*, § 64.

"Injury to the promisee is a good consideration, even in the absence of benefit to the promisor." *White v. Baxter*, 71 N. Y. 254.

See also Harriman, *Contract* (2d ed.), § 91; Clark, *Contract*, p. 106.

The notion of detriment has its root in the original conception of the action for breach of a promise which was based upon the idea of tort, and was "an action for damage to a promisee by a deceitful promisor."¹

But there has been further change, until to-day a consideration need be neither a benefit to the promisor nor a detriment to the promisee, provided only that the promisee has furnished something sufficient in law which the promisor desired in exchange for his promise, and which the promisee was under no legal obligation to give.²

The term "detriment"³ has a clear and distinct meaning in the English language, and that meaning does not accurately cover the modern conception of consideration. Detriment to the promisee is now no more a test of consideration than is benefit to the promisor, and use of the term in that connection leads to misconception of the doctrine and confusion of thought. For instance a young man is ruining his health by drinking rum. A friend offers to pay him \$1000 in consideration of his abstaining from rum for one year. He does this, and is thereby cured of the drink habit. Giving up rum was no detriment to the promisee. It was clearly a benefit, but nevertheless he abstained from exercising a legal right, and thus furnished consideration.

In *Hamer v. Sidway*⁴ the defendant contended that the abstaining from smoking or drinking was an actual benefit to the promisee, and further that it was of no benefit to the promisor, but the Court repudiated the test, and held that the refraining was sufficient consideration.

In cases of this character, it frequently happens that the

¹ Ames, "History of Assumpsit," 2 Harv. L. Rev. 1, 53.

² See *infra*, p. 100.

³ "Detriment. That which injures or causes damage; mischief; harm; diminution; loss; damage." Webster's International Dictionary.

⁴ "Any kind of harm or injury, as loss, damage, hurt, injustice, deterioration, diminution, hindrance, etc." The Century Dictionary.

⁵ 124 N. Y. 538.

request is made with the express purpose of benefiting the offeree.

In *Talbot v. Stemmons*¹ the Court enunciated the rule as follows:

"Whether the act of forbearance or the act done by the party claiming the money was or not of benefit to him is a question that does not arise in this case. If he has complied with his contract, although its performance may have proved otherwise beneficial, the performance on his part was a sufficient consideration for the promise to pay."

Thus a request made by an uncle that a nephew take a trip to Europe for his health or education, with an offer to pay the expenses, will cause a promise to arise upon the trip being taken. This is true even though the uncle expresses the view that his offer indicates liberality and generosity on his part.²

A promise³ is a valid consideration for another promise. There is no such thing in our law as a promise based upon "love and affection." These terms are sometimes called a "good" consideration, but a supposed promise based upon love and affection is gratuitous and void.

"*Consideration*," as used with reference to the subject of contract, is frequently confused with totally different things. Thus the technical term "value," which is employed in certain equitable doctrines, expresses a different idea, and is required for a different object. Anything which is "value" in equity may constitute a consideration in contract, as value is money, or money's worth, but a valid consideration for a promise is not necessarily "value" to constitute one a *bona fide* holder.

It must be remembered further that a solvent man may

¹ 89 Ky. 222, 225.

² *Devecmon v. Shaw*, 69 Md. 199.

³ The word "promise" is used here in the sense of a legal obligation. Mere words of promise to which the law attaches no binding force will not be sufficient. But see Ames, "Two Theories of Consideration," 12 Harv. L. Rev. 515.

make a gift of his property, real or personal, and the doctrine of consideration plays no part in such transactions.¹ Thus Consideration is not necessary for a deed or assignment.

So, also, a release may be gratuitous, and requires no consideration. There is no good reason why A, who desires gratuitously to give up his claim against B, cannot execute and deliver to B a general release under seal without any payment, and thus make B a gift.²

Formerly it was held that under deeds of bargain and sale the grantee took to the use of the grantor. Under the statute of uses such title would revert to the grantor. To prevent this a contrary intent must be shown, and this was indicated either by some actual payment, or by a recitation in the deed stating some consideration or some relationship to the grantor. This explains the so-called consideration of "love and affection" frequently found in deeds.

Care should be taken not to confuse the rules of consideration with those governing offer and acceptance. Agreement must be found, or the obligation is not a simple contract. In addition to this the law requires a technical consideration.

If an offer calls for an act, the act is the desired consideration. If the act is performed there is consideration, but nevertheless, if the performance takes place while the actor is in ignorance of the offer,³ or with no intent to accept it, there is no agreement and hence no contract.

While acceptance and consideration may, and generally do, arise from the same act, they are absolutely distinct, and it is

¹ Digby, *Real Property*, p. 327; *Winans v. Peebles*, 31 Barb. 371.

² *Homans v. Tyng*, 56 N. Y. App. Div. 383, 387; *Finch v. Simon*, 61 id. 139. Both of these cases hold that the New York statute changing the common-law rule as to seals does not apply to releases, as they are not contracts.

Holmes v. Holmes, 129 Mich. 412; *Green v. Langdon*, 28 Mich. 221. These Michigan cases recognize clearly the principle stated in the text.

See (*semble*) *contra*, *Wabash Western Ry. Co. v. Brow*, 65 Fed. Rep. 941. But in this case it was very clear that no gift was intended, and hence the gratuitous release was too suspicious to permit its recognition.

³ *Fitch v. Snedaker*, 38 N. Y. 248. See also *supra*, p. 23.

a mistake to attempt to reduce rules of acceptance to rules of consideration.¹

Lord Mansfield was opposed to all technicalities, and the doctrine of consideration seems to have been looked upon by him with disfavor. At any rate his decision in *Pillans v. Van Mierop*² has been regarded as indicating an attempt to modify the doctrine.³ The action was brought upon a promise to accept a bill of exchange, there being no consideration for the promise.

As the case concerned negotiable paper, it was not necessary to pass upon the question of consideration, and the Court could have sustained its conclusion upon the theory that the doctrine was not involved.

However, the decision was supposed to enunciate the rule that a simple promise reduced to writing required no consideration. *Pillans v. Van Mierop* was decided in 1765, and ten years later it was held in *Williamson v. Losh*⁴ that no consideration was necessary for a promise in writing attested by witnesses.⁵

In 1778, three years after the decision in *Williamson v. Losh*, the leading case of *Rann v. Hughes*⁶ overruled this and similar cases and restored the law of consideration as it had existed prior to the time of Lord Mansfield.

It was in *Rann v. Hughes* that Lord Chief Justice Skynner made the oft-quoted statement:

¹ The cautious language in Holmes, *Common Law*, p. 303, can cause no confusion or mistake, but the statement and classification in Harri-man (Contract, 2d ed., § 144) seem to ignore the very real difference between agreement and consideration as distinct elements of simple contract.

² 3 Burr. 1663.

³ Langdell, *Contract*, § 79.

⁴ Mich. 16 Geo. III, in B. R.

⁵ In several States statutes place written contracts on a par with negotiable paper, as far as consideration is concerned, and make lack of consideration a defense, relieving the plaintiff of the burden of alleging and proving consideration.

Clark (Contract, 2d ed., p. 112) gives six States as having such statutes, viz.: California, Indiana, Iowa, Kansas, Kentucky, and Missouri.

⁶ 7 T. R. 350, n. a.

"All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol, nor is there any such third class as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol and a consideration must be proved."

Perhaps it would have been well if Lord Mansfield had succeeded in modifying or abolishing the doctrine of consideration. In this event the subsequent development of the law of contract might have been very different. But his views did not prevail, and the technical requirement has continued in full force. There is, however, some tendency in modern times to soften its harshness in extreme cases, without admitting that any change is in reality made. At this stage of our development, a courageous statement that the law is modified would be much better than the artificial and illogical explanations often given.

In questions concerning consideration, motive is immaterial. It is enough that there is consideration without reference to the promisor's motive¹ in requesting it.

It may well happen that the promisor has some other object in mind than obtaining the consideration which he asks in exchange for his promise, but this is of no consequence. The law looks simply at the acts of the parties, and if a consideration can be found, that is enough. It inquires no further, and does not concern itself with the motive which may have induced the offer.²

¹ Thomas v. Thomas, 2 Q. B. 851.

² Philpot v. Gunninger, 14 Wall. 570. In this case Strong, J., phrases it thus: "It is, however, not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is 'the cause or meritorious occasion requiring a mutual recompense in fact or in law.'"

§ 29. WHAT CONSTITUTES CONSIDERATION

Anything lawful may constitute a consideration for a promise, provided it has some value, however slight, which the law recognizes.

It may well be said that any description of consideration leaves us where we started, and no satisfactory definition can be given. This is true, and an understanding of the doctrine must be gained through its application and by illustration.

Perhaps this is unscientific, but until legal terminology has been more carefully settled than at present, the ancient hostility to definitions on the part of our lawyers would seem to be well founded.¹

A few well-known cases may be given in illustration of the application of the rules of consideration. Thus in 1835 the surrender of a letter by plaintiff to defendant at the latter's request, and in exchange for his promise to pay plaintiff £1000, was held ² to constitute a valid consideration. That the letter turned out to be of no value to the promisor was immaterial. The plaintiff had a legal right to retain it, and the surrender under such circumstances was enough to meet the technical requirement.

So, too, allowing defendant at his request to weigh two boilers was sufficient consideration to support defendant's promise to give up and surrender the boilers in perfect condition.³

Where a piece of paper, containing what purported to be a guaranty, was surrendered by plaintiff to defendant, at

¹ In *People v. Coleman*, 133 N. Y. 279, at p. 284, Justice Finch says: "I am conscious that legal definitions invite and provoke criticism, because the instances are rare in which they prove to be perfectly accurate."

This is abundantly shown in the drafting of modern statutes and codes, even in the few instances where skilled lawyers, fully understanding their subject, have been the draftsmen.

² *Wilkinson v. Oliveira*, 1 Bing. N. C. 490.

³ *Bainbridge v. Firmstone*, 8 A. & E. 743.

the latter's request, it was held¹ a valid consideration to support defendant's promise to protect certain bills of exchange at maturity. And this was so, even though it was a serious question whether the surrendered document was really a valid guaranty or not. The paper was given as requested, and nothing further was required.

There is a strange old case² in which A, upon receipt of 1*s.* from B, promised that if B could prove that A had beaten him in the chancel of such a church, he, A, would pay B £20. Here we have the requested consideration of 1*s.* paid, but the promise limited by a condition precedent. The action was brought before the proof was given, and, singularly enough, the plaintiff was allowed to prove the beating during the trial, and recovered. There was a contract, but the action was begun before breach, *i. e.* before the happening of the condition. The decision would be considered wrong to-day.

The case has interest when compared with a decision³ in New York in 1820. There, as alleged in the declaration, the plaintiff had claimed a debt to be due to him from defendant, which the latter denied. The defendant then promised that if plaintiff would make oath to the claim, defendant would pay him. And plaintiff did make oath.

The defendant insisted that there was no consideration and that plaintiff could not support his claim upon his own affidavit. There was nothing in this point, and plaintiff had judgment.

If defendant asked an oath as a consideration for his promise, it was sufficient. He was not obliged to make oath, but did so at defendant's request, and in exchange for his promise. But it is doubtful whether this oath was requested as a consideration. It seems more natural to suppose, from the facts alleged in the declaration, that the

¹ *Brooks v. Haigh*, 10 A. & E. 323.

² *Anon.*, Palm. 160; given in a note.

³ *Brooks v. Ball*, 18 Johns. 337.

oath was named merely as a condition, as was the proof of beating in the above case "Anon." Upon such a construction, although the condition was performed before action brought, there would be no consideration for the promise. This seems the more natural interpretation, and in that event there should be no recovery.¹

One dollar is sufficient consideration to support a promise to pay \$1000 in the future.

In the case of *Schnell v. Nell*,² the Court was of opinion that the payment of one cent would not support a promise to pay \$600 in several future installments. They said: "The consideration of one cent is in this case merely nominal, and intended to be so." This is a pure assumption. The issue is one of law, raised by a demurrer to the plea which sets up the defense of no consideration. The instrument in question is set forth in the declaration, and there is no latent ambiguity about it. The fact seems to have been overlooked that the promise is to pay in the future, and hence there is no case of "a mere exchange of money whose value is exactly fixed."

The Court speaks, also, of the instrument as "an unconscionable contract." If that is the true ground, then it is not a question of consideration. The promise was under seal, and the point arose upon the defense of no consideration set up in the answer, which contains no allegation that the cent was not paid. Further, there is in the instrument a promise to pay the cent, which would do away with any question as to actual payment. It is difficult to see why a promise to pay one cent now will not support a promise to pay \$600 in the future. The Court recognizes the fact that "inadequacy of consideration will not vitiate an agreement," and that some particular cent, such as a family piece, or ancient coin, having an indeterminate value would be sufficient. But here the promise to pay the \$600 in the

¹ Langdell, Contract, § 66.

² 17 Ind. 29. See also for further discussion of the case, *infra*, Chap. V.

future does render of indeterminate value with reference thereto, the one cent presently paid or promised.

The defendant seems to have made three distinct promises to three distinct persons upon one consideration.

The instrument purports to be a promise by defendant to pay in future installments \$200 each to Nell, Wendelin Lorenz, and Donata Lorenz, and the consideration, apart from "love and respect," is said to be one cent. Further on it is recited that the three parties in consideration of defendant's promise "agree to pay the one cent." The instrument is executed by defendant, by Schnell, and by one only of the two Lorenz. This seems to show that the defendant never received the consideration contemplated, namely, a promise from the three, as Donata Lorenz did join in the instrument. No mention is made of this, nor is the fact of this recited promise noticed.

The actual result, according to the facts, may be correct, but not on the ground stated by the Court.

In the case of *Sykes v. Chadwick*¹ the action was upon a promissory note made to the order of a married woman. Her husband joined in making the note which was given to induce her to join in a conveyance to bar her dower. It was contended that she had no dower right, and hence there was no consideration for the note. The Court said: "If any release is deemed requisite to confirm the title of lands with which one has been connected, though by the proper construction of the law he has no interest in them whatever, still such a release will be a good consideration for a promise or for the payment of money."

This is a sound position. It is the signature which is requested, and if that is given, a right to abstain is relinquished, thus furnishing a valid consideration. If the request had been to surrender her dower, and not simply to sign a release, it would be necessary that there should be a dower right, because then it would not be the signature but the actual giving up of her dower which would be sought.

¹ 18 Wall. 141.

In 1698 Lord Holt was called upon to decide¹ the case of a male plaintiff suing for breach of promise of marriage. There is, of course, no difference in principle between the case of a man or woman as plaintiff.

Lord Holt found it necessary to say:

"The man is bound in respect of the woman's promise; if she makes none he is not bound by his promise, and then it is a *nudum pactum*; so that her promise must be good to make his signify anything to her; and then, if her promise be good, why should not a good action lie upon it?"

The soundness of this conclusion does not admit of doubt.

As the giving up of a right on request and in exchange for a promise constitutes a valid consideration, it necessarily follows that thus abstaining from smoking, swearing, drinking, or playing billiards, until the offeree reaches the age of twenty-one,² or remaining pure and chaste on the part of an unmarried person,³ or abstaining from getting drunk, will suffice.

A single person, man or woman, has the legal right to be unchaste,⁴ or to get drunk in private.⁵ Abstaining from such actions may, without doubt, constitute a consideration.

In *White v. Bluett*,⁶ a son, not content with the share of the father's property which he was receiving, constantly complained. The question arose whether ceasing to complain at the father's request, and upon his promise, could constitute a consideration. Baron Parke asked: "Is an agreement by the defendant in consideration that his son

¹ *Harrison v. Cage*, 5 Mod. 411.

² *Hamer v. Sidway*, 124 N. Y. 538.

³ *Dunton v. Dunton*, 18 Vict. L. R. 114.

⁴ Sometimes regulated by statute.

⁵ In *Dunton v. Dunton* (*supra*), Williams, J., put it thus: "She was under no legal obligation to the defendant, or to anyone, not to get drunk in her own or any friend's house. She was under no legal obligation to the defendant, or to anyone else, not to consort with persons, male or female, of bad moral character. She was under no legal obligation to the defendant, or to anyone, not to allow a paramour to have sexual connection with her."

⁶ 23 L. J. N. S. Exch. 36.

will not bore him a binding contract?" The Court held there was no consideration. It is quite likely that no juristic act was intended, but if it is found that a contract really was contemplated, it is not clear why none arose. In a proper way, and at suitable times, the son seems to have a legal right to importune the father, and giving up such right seems to meet the requirements of consideration.

Chief Baron Pollock says in the case: "A man might complain that another person used the public highway more than he ought to do, and that other might say, 'Do not complain and I will give you five pounds.' It is ridiculous to suppose that such promises could be binding."

If the circumstances warranted the conclusion that the parties contemplated a contract, there would seem to be no difficulty in finding a consideration, and it is not apparent why it would be ridiculous to find an obligation.

Langdell¹ lays down the proposition that while one dollar is a sufficient consideration for a promise to pay one thousand dollars at a future day, it will only support a general and unqualified promise to pay one dollar at once. He cites no authority, and it is probable that no such case has arisen. Indeed the statement needs no authority. What is a promise to pay ten dollars immediately in consideration of one dollar paid now? The characteristics of a promise are lacking. There is no futurity. Probably the entire transaction is simply a loan of one dollar, for which debt would lie. Pinnel's case² is the nearest approach to this situation, and involved the attempted satisfaction of a debt by a smaller payment. It was there held that this could not be done.³

The explanation generally given for Pinnel's case is that stated by Pollock,⁴ namely, that:

"the Court does not know judicially what a beaver hat may be worth, but it must know that £10 are not worth £20."

¹ Contract, § 55.

² 5 Co. R. 117 b.

³ See *infra*, p. 99.

⁴ Williston's *Wald's Pollock*, p. 211, note d.

One consideration will support several promises if given in exchange for them.¹ As, for example, suppose A gives B \$1000 in consideration for B's promises, as follows: 1. To drive an automobile in a race. 2. To pilot an aeroplane. 3. To write an article upon aviation.

§ 30. CONSIDERATION IN UNILATERAL CONTRACTS²

In cases of proposed unilateral contracts the offer calls for some consideration other than a promise.

Where an offer contemplates a unilateral contract, situations may easily arise which, pressed to a logical conclusion, must result in admitted hardship.

As simple contracts are based upon agreement, the offer may demand any consideration desired, in exchange for the proposed promise. Whether the offer calls for a counter promise, or some other consideration, is a question of fact in each case. When an offer does not contemplate a counter promise but demands something else as a consideration, it logically follows that such offer cannot become a promise until that which is required as a consideration has been furnished. Prior to this there is no contract. It is not possible for the offeree to force a counter promise upon the offeror, because he does not want or ask for a promise.

Suppose, for example, the following case:

A desires his safe moved from his old office to a new one. He asks B to do this act, and says he will pay him \$25. When the safe has been carried to the door of the new building, A appears and tells B that he withdraws his offer, directing him to leave the safe there. Nevertheless B proceeds and completes the moving. Under such circumstances how can a contract be found, or how can A be held to any liability?

Or suppose another case:

¹ Leake, Contract (3d ed.), p. 547.

² Much of what follows is contained in an article by the author published in 23 Harv. L. Rev. 159.

A merchant is anxious to have a cartload of goods placed upon an outgoing steamer, and there is barely time to accomplish this. He asks a cartman to take the goods to the steamer, and offers \$25 for the act. The cartman loads the goods, and proceeds towards the wharf. On the road another merchant hails him and offers \$100 for the immediate cartage of his own goods. The cartman thereupon places the first merchant's goods in a safe place, and proceeds to carry the second load. As the cartman has never obligated himself to take the first load, he cannot be held liable for failure to perform, and the first merchant suffers his loss without remedy.¹

¹ In an interesting letter to the author, Prof. E. H. Woodruff of Cornell says:

"In the hypothetical case of the cartman, would not the cartman be liable in an action on the case for misfeasance? While he was not acting under a contract duty when he deserted the goods; nor guilty of any breach of a true contract, yet it would seem he would be liable for the performance of an undertaking as to which there was misfeasance on his part, upon the application of a principle that antedates our modern notion of contract. You will recall the discussion in *Thorne v. Deas*."

There is much force in this suggestion. It will be observed, however, that the cartman places the goods in a safe place before he takes the second load. Probably, also, he should send prompt notice to the owner. This seems to be a case of nonfeasance rather than misfeasance. It is sometimes said that while there is no liability for nonfeasance in these gratuitous cases, yet if the task is begun it must be carried through. The decisions seem to limit the liability to active misfeasance. A physician who undertakes gratuitously the care of a patient, or the lawyer who thus takes up litigation for a client, must use ordinary care, and must not drop the case until a reasonable opportunity has been given patient or client to obtain a substitute. Perhaps the cartman might be held on the theory that he did not give the first merchant a reasonable chance to obtain a substitute. This argument does not apply to the hypothetical safe case.

In cases of gratuitous undertakings and bailments the theory of liability is based upon the wrongful action of the defendant. A trust or confidence was placed in him, which he has violated. The obligation requires merely ordinary care and slight diligence. No idea of contract is involved and the foundation of the action is tort or a breach of faith.

See *Coggs v. Barnard*, 2 Ld. Raym. 909; *Thorne v. Deas*, 4 Johns. 84; *McCauley v. Davidson*, 10 Minn. 335; *Cannon v. Winton*, 8 Ind. 315; *Hare on Contract*, pp. 127-130; *Ames, History of Assumpsit*, 2 Harv. L. Rev. 1.

In each of these cases it is assumed¹ as a fact that the offer calls for an act. But as in the safe case the offer is revoked before the consideration is furnished, that is, before the act requested is completed, and as in the cartage case the offeree ceases performance, there can be no contract in either.

At first thought it may be suggested that in the safe case the offeror, by ordering the safe-mover to drop the safe, waives the completion of the work. The conclusive answer is that the law demands consideration as an element of contract, and refuses to annex this obligation to the acts of the parties unless the requisite elements exist. There is no such thing as waiving a positive requirement of the law. Until the entire consideration is furnished there is nothing but an offer, which can always be withdrawn.

Again it may be said that as soon as the safe mover begins the work, he indicates his acceptance, a contract arises, and it is too late to withdraw. True, there is an acceptance, but lack of consideration is the difficulty, not want of agreement. This suggestion would meet the case of a proposed bilateral contract, but as the offer asks for an act, neither a counter promise nor anything else except the very thing demanded can be furnished as a consideration. Until the act is completed the consideration is not given.

It does not help the situation to suggest that part of the work has been done, and there is a readiness to do the rest, because until the entire consideration is furnished there is merely an offer, which can be withdrawn. Further, no recovery can be had on a *quantum meruit*, as such obligation must be based upon an implied promise. But no implica-

¹ In the above discussion this assumption must be kept constantly in mind or the argument will be misunderstood. Thus in many instances it may be fairly inferred that a bilateral contract is contemplated, and then acceptance, involving counter promise, may be shown by action. For example, in such cases as employing a salesman for a year, an opera singer for a season, or ordering rails at a price, a bilateral contract may be reasonably presumed as intended by the parties. Beginning to perform the duties may then often indicate both acceptance and counter promise. Such cases present no difficulties.

tion is possible in view of the expressed intent¹ of the offeror as shown under such circumstances. Continuing to move the safe, after the offer is revoked, accomplishes nothing, because there is no longer an offer to ripen into a promise.

If part performance has unjustly enriched the offeror, a recovery for such enrichment may be had in an action on the theory of quasi-contract. In the supposed safe case, however, there could be no such recovery. There is no increase of the offeror's estate and the rule as to unjust enrichment cannot be invoked. Indeed there might be a loss to him, if he desired the safe returned to his old office.

The well-known case of *Fitch v. Snedaker*² goes even further. A reward was offered for information leading to the arrest and conviction of a murderer. On the trial plaintiffs offered to prove that before the offer was known to them they gave information which led to the arrest of the murderer. This evidence was excluded. They then offered to prove that with a view to the reward, they spent time and money and made disclosures whereby a conviction was secured. This evidence was also excluded, and a nonsuit directed, which was sustained on appeal.

Here we have an offer unrevoked, acceptance of that offer, and actual performance of the acts requested, but in spite of all this there was no contract. Giving information leading to arrest took place before the offer was known, hence there could be no acceptance at the time this part of the work was done.³ The acceptance took place after the arrest, and although information leading to the conviction was given pursuant to the offer, and in exchange for the proposed promise, yet this was not enough. Information leading to arrest as well as to conviction was requisite. The plaintiffs had actually furnished all that was asked, but as the first part was performed in ignorance of the offer, it could not be given in acceptance thereof. When they knew of the offer it was too late. A part of the requested act had already been

¹ "*Expressum facit, cessare tacitum.*"

² 38 N. Y. 248.

³ See *supra*, p. 13.

given, and hence could not be furnished afterwards as consideration. After acceptance only part of the consideration was given, and this was not enough. Such a conclusion is strictly logical, and no other seems possible, if legal principles are understood and followed.¹

In *Biggers v. Owen*² there was also an offer of reward. The Court held that until someone complied with the terms of the offer, it could be revoked. In that case some work had been done pursuant to the offer, and one woman arrested but discharged.³

In *Los Angeles, etc. Co. v. Wilshire*⁴ the defendants gave a note payable "thirty days after the completion of" the railway contemplated by the parties, to the order of the plaintiff. This note, with several others, was given to a bank pursuant to an escrow agreement. By this agreement the notes were to be handed to the plaintiff on the completion of the road. The plaintiff spent money in obtaining the franchise and building the road. Before its completion defendants served notice on the plaintiff that they did not recognize any liability on account of said written instruments, because the road was not completed in time. The plaintiff continued the work, completed the road, and began this action. At the

¹ In *Maddison v. Alderson*, L. R. 8 App. C. 467, 472.

The Earl of Selborne, L. C., in giving the opinion of the Court, said: "The case, thus presented, was manifestly one of conduct on the part of the appellant (affecting her arrangements in life and pecuniary interests) induced by promises of her master to leave her a life estate in the Moulton Manor Farm by will, rather than one of definite contract, for mutual considerations, made between herself and him at any particular time. There was certainly no contract on her part which she would have broken by voluntarily leaving his service at any time during his life; and I see no evidence of any agreement by her to serve without, or to release her claim to, wages. If there was a contract on his part, it was conditional upon, and in consideration of, a series of acts to be done by her, which she was at liberty to do, or not to do, as she thought fit; and which, if done, would extend over the whole remainder of his life. If he had dismissed her, I do not see how she could have brought any action at law, or obtained any relief in equity."

² 79 Ca. 658.

³ See also *Cook v. Casler*, 87 N. Y. App. Div. 8.

⁴ 135 Cal. 654.

trial the plaintiff had judgment which was affirmed on appeal.

The Court says: ¹

"The contract at the date of its making was unilateral, a mere offer that, if subsequently accepted and acted upon by the other party to it, would ripen into a binding enforceable obligation. When the respondent purchased and paid upwards of fifteen hundred dollars for a franchise, it had acted upon the contract; and it would be manifestly unjust thereafter to permit the offer that had been made to be withdrawn. The promised consideration had then been partly performed, and the contract had taken on a bilateral character, and if appellant thereafter thought he discovered a ground for rescinding the contract, it was, as it always is, a necessary condition to the rescission that the other party should be made whole as to what he had parted with on the strength of the contract. The notice of withdrawal from the contract was ineffectual, therefore, for several reasons. In the first place, it was based on a wrong theory; the reason given for it was that the road was not constructed within the agreed time, when, as was determined subsequently, there was no time agreed upon. Again it came too late, after the obligations of the parties had become fixed."

The case is singular. Considering it from the standpoint of the Court, as expressed in the language quoted, we find an offer calling for an act, *i. e.* a proposed unilateral contract. On this state of facts the Court proceeds to tell us that after a portion of the requested act had been completed, it would be unjust to permit the offer to be withdrawn. That is to say, although the consideration had not been furnished, and hence no promise had arisen, yet, as it works injustice, the offer cannot be withdrawn. The Court seems to have had in mind some notion of estoppel.

The opinion then goes on to say that after part performance "the contract had taken on a bilateral character." This is a remarkable instance of confusion of thought. By what

¹ 135 Cal. 658.

magic the offer had been turned into a "contract" does not appear.

But then, in spite of the fact that it has said that a "bilateral contract" has arisen, the Court seems to think that nevertheless there may be a withdrawal, provided the parties can be placed *in statu quo*. The expression "rescission" seems to indicate that the Court considered that there was a contract. If there was a contract, what possible ground existed for rescission? If there was merely an offer, what can be intended by "restitution"? The defendants had received nothing to restore. Perhaps the Court means that under such circumstances an offer cannot be withdrawn, because it believes there is an estoppel. Again, at the end of the quotation, the Court seems to have an idea that there is a contract after all, as shown by the expression "after the obligation of the parties had become fixed."

It is not apparent what difference it could make whether the defendants assigned a correct or incorrect theory for their proceeding. The sole question is whether the defendants could withdraw their offer at any time before it ripened into a promise. Apparently the Court proposed to enforce its ideas of justice, even though it was not clear upon what theory it should proceed. Nevertheless, a thought is suggested which will be further commented upon below.

The case has been discussed somewhat at length both because it is a good example of the lack of clear thinking which is often found in the opinions of the Courts upon this subject, and also because it suggests the idea of estoppel.

It is not clear that any such point as that raised by the Court is necessarily involved.

The action was upon a written instrument, in form a promissory note. Can this be spoken of as an offer? What was the instrument when placed in escrow? It was not negotiable, and as there was no consideration it was not a contract. The Court says that the action was based "upon a written instrument." This writing seems to have been merely an acknowledgment of indebtedness which was delivered

according to the terms of the escrow agreement. The facts hardly warrant the inference that the escrow agreement and the note were together intended as an offer.

It is probable that there was a bilateral contract made at the time of executing the escrow agreement. In that case it would be clear that the defendants could not withdraw.

It sometimes happens that a case is discussed on the assumption that a question of the revocation of an offer is involved, while in fact no such point is raised. Thus, in *Blumenthal v. Goodall*,¹ the plaintiff was a broker suing for his commission. He had been authorized by defendant to sell certain property, and had procured a customer who signed a memorandum, was ready to make a suitable deposit, and received an abstract of title. Then the defendant attempted to revoke his offer, but it was too late. The plaintiff had furnished the act requested, namely, producing a customer ready to buy. The promise to pay the commission had arisen, and the defendant was bound. The decision was correct and presents no difficulty.

In *Plumb v. Campbell*² the Court touches upon the question of unilateral contract, and quotes with approval a statement by Parsons,³ which seems to suggest that beginning to do an act is enough to cause the contract to arise. It is not at all clear that Parsons intended to lay down any such proposition. Probably he had in mind bilateral contracts and cases where the act has been completely performed. *Plumb v. Campbell* did not directly involve the point. Accepting the Court's apparent interpretation of the transaction, there was an offer asking for the delivery of bonds as a consideration. The delivery had taken place. There was no attempted revocation, and the question came up with reference to the construction of the statute of limitations. But the case is pertinent to the present discussion, because it was necessary for the Court to determine the time when the contract arose.

¹ 89 Cal. 251.

² 129 Ill. 101.

³ 1 Parsons, Contract, § 450.

The harsh results which are possible in this class of cases are revolting to a natural sense of justice, and there is a constant effort to devise some way out of the difficulty. Under these circumstances it is essential to make sure that there is no fault with the analysis, and that the difficulty does not lie there, rather than with the rule of law.

The elements of a simple contract are mutual assent and consideration. Each is essential. When an offer contemplates a bilateral contract the consideration demanded is a counter promise. In such a case the acceptance involves two things — agreement and consideration. The term "I accept" fully expressed would read "I accept and promise." This double character in bilateral contracts is not always observed. If, on the other hand, the offer contemplates a unilateral contract, acceptance indicates agreement only, and the element of consideration is lacking until the specific thing requested is furnished. Referring to the safe case mentioned above, if the safe-mover, either by word or action, accepts the offer, we have agreement. If he completes the moving there is consideration. But, it is argued, the offer can be withdrawn at any time until it becomes a promise, and acceptance does not affect this, because an irrevocable offer is inconceivable in law, and to hold otherwise is to do away with the doctrine of consideration.

However, this argument may be questioned. To assume that an accepted offer calling for an act as consideration is under some circumstances irrevocable does not compel the conclusion that such offer is already a promise, or can be enforced as such. An offer remaining open is simply a statement by the offeror that he wishes a certain thing, and will continue in that state of mind. Upon such indication of intent, the withdrawal of the offer, after the offeree has accepted and started in to do the act in reliance thereon, will cause loss. This suggests estoppel *in pais*.

The doctrine of consideration is not affected in any way. There is no promise until the consideration is performed, and the offeror can never be held to his proposed promise

unless he receives the consideration, but nevertheless he cannot withdraw his offer.

Perhaps there has been too ready acquiescence in the idea that an offer must necessarily be revocable under all circumstances.

The foregoing suggestion as to a possible estoppel does not meet all situations. Thus in the hypothetical case of the truckman given above, the hardship falls upon the merchant. As the truckman makes no offer, it seems impossible to prevent him from leaving the goods in a suitable place, even though he thereby disappoints the just expectations of the merchant. There can be no estoppel in such a case, at any rate. Again, in the safe case, if the owner takes possession of the safe, even though he be estopped from withdrawing his offer, there can be no contract, because the safe-mover is prevented from performing by being deprived of the possession of the safe. The supposed estoppel is of no avail, because the consideration is not, and cannot be performed, and it is utterly immaterial that this result is brought about by the offeror's own act. The doctrine of consideration prevents a contract from arising.

Or, if the safe-mover refuses to surrender the safe upon demand of the owner, and completes the act of moving, he thereby commits a tort. Public policy would seem to make it impossible for a tortious act to form the consideration of a promise.

Professor Williston says of this class of cases:

"To deny the offeror the right to revoke is, therefore, in effect to hold the promise of one contracting party binding, though the other party is neither bound to perform nor has actually performed the requested consideration.

"The practical hardship of allowing revocation under such circumstances is all that can make the question doubtful."

This argument, on the other hand, is not conclusive against the theory of an estoppel. Such a theory does not require, even in effect, that the promise of one party should be binding, although he has not received his consideration.

Because the offeror is not allowed to withdraw his offer, the result is not necessarily a promise, and there never will be one until the consideration — the act — is actually performed. He is merely prevented from withdrawing his offer when the circumstances render such action unjust. But he has made no promise, and hence cannot be called upon to perform until he has received the consideration demanded. This protects both parties, and brings about a just result.

A person is responsible for his actions, and therefore anyone making an offer is, in so far, no longer free, although his offeree may be. This is evident in cases of ineffectual revocation. The offeree is not yet bound, yet the offeror has changed his mind, and desires to escape the possible consequences of his offer. If he is unable to communicate a revocation, he may become bound by a contract, in spite of his attempt to avoid this result.¹

An estoppel simply limits the power of revocation, and there is no good reason why this should not be done. It takes place only when strict justice so requires, and both parties are fully protected.

These cases do not fall strictly within the equitable doctrine of estoppel *in pais*, as that subject has been developed heretofore, but a relief somewhat analogous thereto and depending upon the same ideas would seem to be possible, even though there may be some more suitable nomenclature.

It would seem that this doctrine, hinted at in some of the decisions, may, in spite of some difficulties, offer escape from occasional intolerable situations.

As has been well said,² "there are few more troublesome questions in our law."

¹ See *supra*, p. 30.

² See Williston's Wald's Pollock, p. 34, n. 39.

The possible hardship did not trouble Professor Langdell. He merely said (Contract, § 4): "The true protection for both parties is to have a binding contract made before the performance begins, by means of mutual promises." This is much like replying to a question as to a specific for a certain poison, Don't take the poison.

Several Considerations

When several things are demanded as consideration, the offeror must receive them all, or there is no promise. If they are all given, it seems to be sufficient even though some¹ turn out to be invalid. The argument is that the offeror has received all that he designated in his offer, although some of the things requested do not, in fact, constitute consideration.

This rule was stated in 1586 by Coke in the *Crisp and Golding* case,² and has been reiterated in modern decisions.³ The result is not entirely satisfactory. Thus in *King v. Sears*⁴ the acts asked were omitting to distrain for rent, both past due and future, together with permission to give up the premises at the then next Michaelmas. The only valid consideration was abstaining from distraining for rent already due. There was no right to distrain for future rent, nor to prevent the tenant from leaving. As it would be illegal for the promisee to do these two things, he could not abstain from them in exchange for a promise. Therefore the defendant did not receive from him the things for which he bargained.

Suppose A offers to pay B \$1000 in exchange for a coin worth \$50 and a valuable portrait. B delivers the coin but not the portrait. C, not induced by B, delivers the portrait to A with his compliments. Although A has received all that he requested, it seems clear that B could not recover on the promise to pay him \$1000. Or, suppose that A was employed by the City of New York to sprinkle a certain street from 10 A. M. to 2 P. M. B lived on this street and promised to pay A \$10 per month to sprinkle from 10 A. M. to 6 P. M. A sprinkled for three months as requested. Here the street has been sprinkled from 10 to 6 as B desired. But this was furnished by A from 2 to 6 only. Although

¹ Leake, *Contracts* (3d ed.), p. 547.

² 1 Leon. 296; s. c. nom. *Cripps v. Golding*, 1 Roll, Abridg. 30.

³ *King v. Sears*, 2 C., M. & R. 48.

⁴ *Idem*.

A drove the cart from 10 to 2, it was on behalf of the city, and hence this was done by the city and not by A. Doubtless B had paid already by his taxes for his share of such sprinkling. Why should he pay A \$10 per month for sprinkling from 2 to 6, when that price was based upon a longer period, namely, from 10 to 6? On the line of argument used in *King v. Sears*¹ the entire \$10 would be due.

Justice seems to require that as half the sprinkling was furnished by A, and B actually received all he requested, he should pay one-half the amount offered. But it is difficult to find any logical argument upon which to base such a result in contract. If any promise arose it was to pay \$10 for a total sprinkling, not \$5 for half the amount.²

§ 31. CONSIDERATION IN BILATERAL CONTRACTS

A promise may be a valid consideration for another promise.

In cases of proposed bilateral contracts the offer calls for a promise as consideration.

A bilateral contract consists of two promises, each exchanged for the other, and each the consideration of the other.

When the offer calls for a promise as consideration, nothing else can take its place, and an acceptance indicates both agreement and a counter promise. The offer ripens into a promise as soon as the counter promise is given.³

But unless we settle first what the law means by "promise," there is danger of confusion. What is the test by which this can be determined? The question is not easily answered.

By the term "promise," the law frequently indicates an obligation, and then the expression is equivalent to contract.⁴

"Promise" is often used in a lay sense to indicate that

¹ 2 C., M. & R. 48.

² The express offer precludes finding a contract implied in fact (*ante*, p. 80). If there is any obligation it must be quasi-contractual.

³ See *ante*, p. 34, for discussion of question as to when contracts *inter absentes* arise.

⁴ Bouvier's Law Dictionary defines promise thus: "An engagement by which the promisor contracts with another to perform or do something to the advantage of the latter."

an expectation of realization is given, without meaning thereby a legal, but rather a moral, obligation. And it is employed sometimes, even in a legal sense, as forming an element of contract, and not the obligation itself.¹ But unless promise, in law, indicates an obligation — a contract — it appears to be nothing more than an offer, as when we say "an offer may be withdrawn until it ripens into a promise."

In any given case where an offer calls for a promise from the offeree, does the offeror demand a moral, or a legal, obligation, that is, does he request acts on the part of the offeree of such a character that the law will annex an obligation? If the offeror merely asks for a moral obligation, then giving words of promise is ample consideration. In fact, stating an empty formula, such as "I promise," would be sufficient, if requested and given as consideration.

But, in the average case, when a man makes an offer contemplating a juristic act and asking for a promise, he means a legal obligation.

His intention is a question of fact, and there may be cases where it is reasonable to find that a moral obligation is intended. Thus, suppose A desires to make a gift to B, and says, "I promise to give you \$10,000 in consideration of your promise to C to give him a cow"; B replies, "I accept," and then says to C, standing near, "I promise to give you a cow." Here it is possible to say that an act, namely, a moral obligation, is requested.² But it would

¹ Thus the Century Dictionary in defining "promise" says: "In law, a promise is not binding in such a sense as to be directly enforceable through the Courts unless made upon a consideration good or valuable; in which case the promise and the consideration together form a contract or agreement (if under seal, termed a covenant) which binds the promisor."

This definition seems erroneous in speaking of promise and consideration as together forming a contract. It would be more accurate to say that agreement and consideration form a contract or promise. When a legal obligation is intended the word "promise" is equivalent to contract and indicates the obligation raised by the law upon agreement and consideration.

² Suppose a devise to A of \$10 000 on condition that he gives \$5000 to C. On what theory is C allowed to recover from A?

seem there should be clear and strong evidence of this, and that without such evidence the word "promise" means "contract."

When an offer contemplates a bilateral contract, a counter promise, *i. e.* a counter legal obligation, is asked as a consideration. The law annexes the obligation to the acts of the promisee, but unless his acts are such as to cause the obligation to be so annexed, he does not furnish the consideration desired. His acts are not requested, but a certain result, *i. e.* a legal obligation. Whether the consideration has been furnished in a given case is both a question of fact and of law.

If the premise is correct, as is here contended, that in law "promise," when used to indicate obligation, is equivalent to "contract," then it follows that a promise of this character is necessarily a legal obligation.

An obligation must bind one to something. It must be more than mere words. In determining, therefore, whether there is a promise of this description, an examination must be made of the facts. The question involved is, Does the supposed promisor bind himself to anything? Suppose that A asks B for B's bond as a consideration for A's offered promise. If a contract is to arise, a bond must be furnished, that is, something which, when executed, will be of such a character that the law will annex to it the consequences of a bond. Otherwise it is no bond, and the requested consideration is not furnished. If A asks B for his promise to give such a bond, then such promise, if given, constitutes a consideration. We examine B's acts to see whether they are of such a nature as to cause the obligation of promise to be annexed to them. This we decide by the exercise of faculties trained in the law. Suppose A and B are looking at an empty basket. A says, "I promise to give you \$1000 in exchange for your promise to refrain from taking potatoes out of this empty basket." B replies, "I so promise." Can it properly be contended that A's suggested promise to pay \$1000 is supported by any consideration? As there is nothing in

the basket, how can we maintain that there is any binding promise to abstain?

In any question as to the existence of a bilateral contract we must look at the subject matter of the proposed promises to judge whether they exist as obligations or not, and the contention would seem to be correct that unless this is such as to meet the legal conception of obligation there is no contract. To determine whether there is a bilateral contract, the subject matter of the proposed promises must be known.

If an offer designates a promise as consideration, then in most instances we are justified in the conclusion that a legal obligation is wanted, and if an examination shows that the given words of promise do not obligate there is no contract. In any given case it may happen that no legal obligation is asked. In such case the contract is unilateral. But in proposed bilateral contracts the counter promise must be a legal obligation.

If a promise is dependent upon the will of the person making it, such promise does not constitute a consideration in a bilateral contract.

Imagine a writing purporting to be a bilateral contract for the sale of wheat, containing all the necessary terms, and among them the item "subject to sample car." The vendor may submit car after car, and if the vendee choose to reject, there is no remedy. His supposed promise to take and pay is entirely subject to his own will. As he is not bound he has furnished no consideration. It follows that the vendor is not bound by such an arrangement. Hence if the vendee should desire to have the proposed plan carried out, and write that he "waived the sample car," there would be no change in the situation. As there is no contract, there is nothing to waive.¹

In *Taylor v. Brewer*² a claim to compensation was based upon a resolution which read, "Resolved, that any service

¹ But see *Columbia Malting Co. v. Church*, 170 Fed. Rep. 309, where the Court seems to have overlooked the point suggested in the text.

² 1 M. & S. 290.

to be rendered by Walsh shall after the third lottery be taken into consideration and such remuneration be made as shall be deemed right." Recovery was refused because it was "simply an engagement of honor."

In a Massachusetts case¹ the defendant ordered a suit of clothes of the plaintiff "to be made to the satisfaction of the defendant." The suit was returned as not satisfactory and a judgment upon a verdict in favor of the plaintiff was reversed. The Court, among other things, said:

"It is not for anyone else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide for himself whether the articles furnished are to his satisfaction."

As the articles were for personal use, the expression "satisfaction," was held to refer to personal, and not reasonable satisfaction.

The Court treated the case as one of contract, and it must be bilateral. If we are not permitted to take note of a mental state, there would seem to be no contract, because a promise must be obligatory, and not dependent upon the whim of the promisor. Hence, as the defendant made no obligatory promise, there is no consideration for plaintiff's promise. But sensations as of pleasure, pain, satisfaction, and the like, are not subject to one's will. Why, then, are not such sensations triable? To prove a change of domicile, it is permissible to put a man on the stand and ask his intentions. If he answers that he did not intend to change, this would be competent, although not conclusive evidence. A similar situation existed in *In re Craignish*.²

Suppose in the case under discussion, the tailor had put the defendant on the stand, and asked him the question, "Were you not, in fact, satisfied with the suit?" and he had answered "Yes," or had broken down under cross-examination, could not the jury have found "satisfaction" as a fact?

¹ *Brown v. Foster*, 113 Mass. 136.

² 3 Ch. 180.

If so, the case is not one where the supposed promise is dependent upon the will of the defendant promisor.

The discussion is not merely of academic interest, as practical questions turn upon the view which may be taken.¹

§ 32. PERFORMING, OR PROMISING TO PERFORM, AN EXISTING DUTY OR OBLIGATION AS A CONSIDERATION FOR A NEW PROMISE

§ 33. (a) When public policy intervenes

Sometimes the formation of a contract based upon the performance of an existing obligation is prevented by public policy. Then it makes no difference whether the proposed consideration is performing the obligation, or promising to perform it.

These cases form a distinct class and present few difficulties.

Under this head fall cases where the obligation consists of some special duty towards the public, as in the case of officials, firemen, seamen, and the like, and also of the general duty imposed upon everyone to abstain from committing a tort.²

The law will not sanction a contract based upon such consideration.

The following instances illustrate this proposition:

In 1809, it was held in *Stilk v. Myrrick*,³ that a seaman was not entitled to recover a higher rate of wages than that stated in the ship's articles, although the captain agreed to pay the higher rate in consideration of the performance of increased work necessitated by the desertion of two of the crew, it being impossible to procure substitutes at an intermediate port.

Lord Ellenborough said:

¹ This is true of many of the cases discussed in the next section.

² *Tolhurst v. Powers*, 133 N. Y. 460.

³ 2 Camp. 317.

"I think *Harris v. Watson*¹ was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed."

In spite of the doubt above expressed, the true ground of the decision seems to be the danger to the public, should sailors be allowed to recover increased pay under such circumstances.

In *England v. Davidson*,² the plaintiff was a constable, and the case turned upon the question whether the act done as a consideration was part of his official duty. The defendant put in a plea alleging that plaintiff was a constable, and that as such constable, it was his duty to give all information and arrest the accused. In sustaining a demurrer to the plea, Denman, C. J., said:

"I think there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law, unless the grounds for so deciding were very clear."

The Court here recognizes the principle that doing services within the constable's duty would not constitute a consideration for a promise, and indicates public policy as the ground.

It seems clear that defendant should state facts in his plea showing that the alleged contract was void on the ground of public policy, unless this appears on the face of the declaration. Whether, in a given case, services are within

¹ Peake, 102. This was a case of a seaman's claim for higher wages, and similar to *Stilk v. Myrick*.

² 11 A. & E. 856.

the public duty of a plaintiff would depend upon questions of fact and of law. If the defendant claims as a defense that plaintiff is a constable, then he should allege and prove that fact. But whether the act claimed as consideration falls within the duty of a constable is a question of law which the Court must determine. The demurrer to the plea admitted the fact that plaintiff was constable, but the Court was of opinion that such fact did not necessarily indicate a duty to do the acts claimed as consideration.

Again in *Reif v. Page*,¹ the plaintiff was an assistant engineer in the fire department. At a hotel fire the defendant offered \$5000 to any person who would rescue his wife from the burning building, dead or alive. The plaintiff thereupon brought out the woman's dead body.

There was a nonsuit on the trial, and the Court said in the course of its opinion, reversing the trial Court:

"The ordinances of the city of Oshkosh in respect to its fire department were read in evidence, and reference made to the city charter in that behalf. We do not care to comment upon these, for we are clear that there is nothing in them which made it the duty of the plaintiff to enter the fourth story of the burning building and rescue the body of Mrs. Page from the flames, at the imminent hazard of losing his own life. That he incurred such hazard there can be no doubt from the testimony."

As there was a nonsuit, all plaintiff's facts, supported by testimony, must be assumed to be true for the purposes of the appeal. But the Court examined the ordinances, and determined as matter of law that there was no duty to do the act. Here, also, was involved the question of public safety.

Another case illustrating the same principle is *Dodge v. Styles*.² There the consideration alleged for the claimed promise was obeying a duly served subpoena.

Abstaining from committing a tort, alleged as a consideration for a promise, finds frequent illustration in cases of re-

¹ 55 Wis. 496.

² 26 Conn. 463.

lease from illegal imprisonment. In *Smith v. Monteith*,¹ there was a discharge of one Dunlop from imprisonment in exchange for a promise by defendant to pay £20 to plaintiff.

The plea set up as a defense that plaintiff had no original cause of action against Dunlop. On demurrer the Court held the plea bad on the ground that there was nothing alleged showing that the arrest of Dunlop was illegal. This well-known case recognized the general doctrine that release from illegal arrest cannot constitute a consideration for a promise, or, putting it differently, that the law will not allow such a contract to be made. Pollock, C. B., says:

“If a party does an illegal act, or if he abuses the process of the Court, to make it the instrument of oppression or extortion, that is a fraud on the law.”

On the other hand, there are cases where refraining from committing a tort is sufficient to sustain a promise. But it is observable that this occurs in cases which should never have been held to be torts, that is, where there is neither intent nor negligence—in other words, they are not, on principle, cases of tort.² Therefore this exception to the general rule of contract may well arise from the fact that it is an anomaly to treat the acts in question as torts. Public policy does not operate in such cases to prevent a contract from arising, as it does in the instances where tort should be found on principle.

§ 34. (b) When public policy does not intervene

§ 35. (1) *According to the generally accepted view,³ the doing of something which one is already under obligation to perform does not constitute a consideration for a new promise in any case.*

¹ See *Atkinson v. Settree*, Willes, 482, and also *Williston's Cases on Contract*, p. 270, n. 1.

² See note by Ames, 12 Harv. L. Rev. 516, and authorities there cited.

³ *Arend v. Smith*, 151 N. Y. 502; *Benjamin on Contract*, 26, and cases cited.

As where the alleged promise is made by some third person, a stranger to the original obligation, and the intended consideration is the performance by the obligor of such existing obligation.

In England there is leading authority for the position that such performance constitutes a valid consideration.¹ In the United States the general view is against allowing a recovery in such cases.² In a few jurisdictions, such as Massachusetts,³ a contrary conclusion has been reached.

The development of this doctrine seems to have been influenced by the growth of the rule that *the payment of a sum less than the amount of a liquidated debt is not a sufficient consideration to support a promise to accept such sum in satisfaction of the entire debt.*

In *Clayton v. Clark*,⁴ Woods, C. J., said:

"It has been held in England, though not unbrokenly, nor without now and then hostile criticism from bench and bar, that an agreement by a creditor with his debtor to accept a smaller sum of money in satisfaction of an ascertained debt of a greater sum, is without consideration, and is not binding upon the creditor, even though he has received the smaller sum agreed upon in the new contract. And in the United States, blindly following what was supposed to be settled law in England for nearly three hundred years, our Courts have uniformly announced adherence to this rule, though in most cases examined by us no such announcement was necessary to their determination."

It was in *Pinnel's case*,⁵ decided in 1602, that Coke gave his oft-quoted remark:

¹ *Bagge v. Slade*, 3 Bul. 162; *Shadwell v. Shadwell*, 30 L. J. R. C. P. 145; *Scotson v. Pegg*, 6 H. N. 295.

² For a full collection of authorities, see Williston's *Wald's Pollock*, p. 209, note 19.

³ *Abbott v. Doane*, 163 Mass. 433.

⁴ 74 Miss. 499. For a full discussion of the cases see the opinion in this case, and read also *Jaffray v. Davis*, 124 N. Y. 164.

⁵ 5 Co. R. 117.

"And it was resolved by the whole Court, that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction for a greater sum; but the gift of a horse, hawk, or robe, etc., in satisfaction is good."

This view was affirmed in *Cumber v. Wane*,¹ *Sibree v. Tripp*,² and later in *Foakes v. Beer*.³

Dean Ames points out that in Pinnel's case, and other early decisions, the judges had no reference to the technical "consideration" required to support an assumpsit, and shows that Lord Ellenborough was the first who erroneously based the proposition upon the theory of modern consideration.⁴

In spite of much hostile criticism, and an occasional adverse decision, the rule still adheres in our law, unless changed by statute.⁵

The proposition set forth at the opening of this section (a), is well stated in *Merrick v. Giddings*,⁶ where the Court says:

"The rule established by these authorities is, that a promise made in consideration of the doing of an act which the promisee is already under obligation to a third party to do, though made as an inducement to secure the doing of that act, is not binding because it is not supported by a valuable consideration. We conceive this to be clearly true when the act done on the part of the promisee involves nothing more than *performance of the original obligation toward the party to whom it was due.*"

There are many authorities sustaining this view.⁷

¹ 1 Str. 429.

² 15 M. & W. 22.

³ L. R. 9 App. Cas. 605.

⁴ 12 Harv. L. Rev., pp. 522-527, where there is a complete historical review of the cases. Free use of this article has been made herein.

⁵ See Williston's *Wald's Pollock*, pp. 210-212, and note at p. 211, with full collection of authorities; 20 L. R. A. 785, n.; 57 Cen. L. J. 244.

⁶ 1 Mack. 394.

⁷ See, for example, *Bunge v. Koop*, 48 N. Y. 225; *Arend v. Smith*, 151 N. Y. 502; *Lingenfelder v. Wainwright*, 103 Mo. 578, and cases cited; *Croseman v. Wohlleben*, 90 Ill. 537.

The case of *Lattimore v. Harsen*¹ is generally considered as being in conflict therewith. There the contract was for the opening of a cartway in New York. The plaintiffs, who had promised to do the work, became dissatisfied, and determined to discontinue operations, when, according to the statement of facts, the defendant "released them from their covenant." If that is a true statement the case is without difficulty. As the old contract is extinguished by the release there is no trouble in finding a new one. The Court does not appear to have regarded the facts in this way, and treats the case as one where the plaintiffs abandoned the work, and defendants made the new promise to induce them to continue. From this point of view the case is generally regarded as an authority against the proposition that the previous contract would leave the proposed new promise without consideration.

The Court seems to have been influenced by the fact that a penalty was attached for failure to perform the first contract, and to have entertained the erroneous idea that this gave plaintiffs the right to abandon performance and pay the penalty.

The case does not represent the prevailing law of New York. The general rule in the United States to-day is illustrated by the later New York cases,² and by such decisions as *King v. Duluth*,³ and *Merrick v. Giddings*.⁴

The doctrine seems to have been totally misapplied in *Kellogg v. Olmstead*.⁵ There, a bond secured by mortgage matured, and it was agreed that the mortgagee should extend the time of payment three years in consideration of a promise by the mortgagor not to pay for three years. The Court held that this was no consideration, and hence the mortgagee was not bound. There was a failure to recognize the fact that the right to pay a debt and stop interest is often important. As there was a well-reasoned dissenting

¹ 14 Johns. 330.

² *Arend v. Smith*, 151 N. Y. 502.

³ 61 Minn. 482.

⁴ 1 Mack. 394.

⁵ 25 N. Y. 189, followed in *Olmstead v. Latimer*, 158 N. Y. 313.

opinion by Judge Davis, calling attention to this very point, the position of the Court is the more strange.¹ On the other hand this distinction was recognized, and the decision based upon it, in *Benson v. Phipps*,² and even more fully pointed out by the same Court in *Austin v. Bohn*.³ The rule adopted by the New York Court has been enunciated in some other jurisdictions,⁴ but the Texas view seems to be correct.

§ 36. (2) *Promising to do something which one is already under obligation to perform does not constitute a consideration for a new promise.*

There is very little authority upon this proposition.⁵ In *Merrick v. Giddings*,⁶ the Court, after stating that doing an obligated act will not furnish consideration for a third person's promise, says, by way of dictum :

"On the other hand, if the promise be made in consideration of a promise to do that act, entered into directly with the promisor, as indicated by Mr. Pollock, then the promise is binding, because not made in consideration of the performance of a subsisting obligation to another person, but to a new consideration moving between the promisor and promisee."

This position is also taken by Langdell⁷ and Pollock.⁸

¹ The Court in *Olmstead v. Latimer*, 158 N. Y. 313, intimates that it is bound by the rule of *stare decisis*.

² 87 Tex. 578.

³ 87 Tex. 582. See to same effect, *Pierce v. Goldsberry*, 31 Ind. 52; *Royal v. Lindsay*, 15 Kan. 591; *Shepherd v. Thompson*, 98 Ky. 668; *Chute v. Pattee*, 37 Me. 102.

⁴ See, for example, *Hume v. Mazellin*, 84 Ind. 574; *Wilson v. Powers*, 130 Mass. 127.

⁵ Williston's *Wald's Pollock*, n. 19, p. 209, pertinently remarks: "From a practical standpoint it seems an odd distinction. The assurance of future performance given by a promise may be an excellent thing, but to hold that it is a better consideration than actual present performance seems extreme."

⁶ 1 Mack. 394.

⁷ *Contract*, § 84.

⁸ Williston's *Wald's Pollock*, p. 208.

It is difficult to distinguish between "doing" or "promising to do" an obligated act, as a consideration for a new promise.

But it is maintained¹ that although doing such obligated act cannot constitute a consideration for a new promise, yet *promising* to do so can and does, because by such new promise the person thus subjects himself to a new liability for damages upon failure to perform. It has been pointed out² that this suggestion assumed the point in dispute, because there would be no new liability unless there were a new contract. The contention is that there can be no new contract because the supposed promise to do the act amounts to nothing, and cannot be a consideration for the supposed new promise of the third party. Hence such intended new promise fails for lack of consideration, and the failure of one necessarily indicates the failure of the other. This is the point in dispute which seems to be assumed by the above argument.³

The difficulty has not been met. It may well happen that some third person is much interested in having a certain contract carried out, and is willing to promise an additional amount as a further inducement for the performance thereof. Thus the question may become practical and important.

In considering this proposition a suggestion is made in a book review which raises an interesting point.⁴ The reviewer says:

"The proposition that the performance of, or the promise to perform, a contractual obligation, is no consideration for another promise, does not deprive anyone, who wishes to secure a new promise to perform the same thing, of the power of doing so. If B in the case put wishes to secure a new promise from A that he will perform his contract with C, he can do so by giving, that is, delivering, something to

¹ Langdell, Contract, § 84.

² Anson's Contract (1st ed.), 80.

³ But see an interesting article by Professor Langdell, "Mutual Promises as a Consideration for each other," 14 Harv. L. Rev. 496.

⁴ Some portions following are taken from an article by the author in 16 Harv. L. Rev. 319, 323.

A as a consideration for such new promise, as, for example, five dollars, or a book. The passing of the title is a detriment to the person giving it, and is a good consideration for the new promise of A."¹

But how does this suggestion help the situation? The correctness of the contention that, under the circumstances named, no second bilateral contract can be formed is assumed by the reviewer, and on that assumption his suggestion is made. Suppose, then, that A is under contract with C to do a specific thing. B, who also desires that A should do such specific thing, tries to contract with A, and in exchange for A's proposed promise to do such thing B promises to pay him \$5. If a contract does not arise, it must be because A, being already under contract with C, cannot make a new promise to do the same thing. If, then, A sues B upon the promise to pay him \$5, B's defense is "no consideration," because A could not give the exchange promise asked; but if B sues A upon A's attempted promise, A cannot answer "no consideration," because B's promise to pay \$5 may certainly constitute a consideration, but A's answer must be "no contract," because the law will not annex the consequences of contract to his own attempted promise. That is, the law will not recognize that A can promise under such circumstances. The difficulty lies in A's position, and the entire discussion turns upon that. If the law will annex the consequences of legal promise to A's words of promise, there is no difficulty, but if we concede that the law will not do this, how can such consequences arise by B's payment of \$5? The law must still refuse to annex its consequences to A's words, and B has received nothing for his \$5. The difficulty lies with the proposed promise of A, and not with B's promise. B's promise to pay \$5 must be just as effective as the actual payment of \$5, and the entire contention goes back to A's inability to promise at all under such circumstances. It would thus

¹ 2 Columb. L. Rev. 61.

seem evident that the reviewer's suggestion does not meet the objection. B has received nothing for his \$5, and should be able to recover it back on the theory of failure of consideration.

Suppose, to take an extreme case, that A being under contract to do a certain thing gives what, in form, is a promise under seal to do that same thing. Could such instrument be enforced at common law? To be consistent, one must answer "no." If we maintain that such words of promise are no consideration for an exchange promise, it is because they amount to nothing, because they cannot be an obligation. If that position is sound, it cannot change matters that the words are put under seal. How can either the sealed or unsealed words amount to anything? The proposed promisor has nothing to promise, as he has entirely disposed of his right to refrain from doing the supposed act.

The fallacy of such a position as that taken by the learned reviewer is perceived by Sir Frederick Pollock. He maintains as a general proposition that there can be a binding second promise to do the already obligated act, and that this second promise can become a valid consideration for the promise of a third person.

In maintaining this position he says:¹

"Let us now take the case of a promise by John to Peter to do something which he has already promised William to do. Such a promise may obviously create a moral obligation; for Peter may in many ways have a just and reasonable interest in being assured that John will perform his contract with William. Then is there any reason why it should not create a legal obligation, if supported by a sufficient consideration on Peter's part? The promise is a new and distinct promise, creating on the face of it a new and distinct duty to a new party. Duties to several parties to do the same thing are simultaneously created in many quite common forms of covenants. Why should they not be created by successive and independent acts? Will anyone

¹ Williston's *Wald's Pollock*, 208.

deny that John's promise to Peter will be binding if given in exchange for a performance — say immediate payment of money — by Peter? If it is not, this must be the result of some special rule of legal policy, for no other objection seems possible. But of any such rule of policy there is no trace. If then the promise is binding when given for a performance, why should it be less binding when it is given in exchange for Peter's promise? There is no reason in the nature of the case for making any difference. If there were a positive rule of law, founded on reason of policy, for not allowing John's promise to Peter to perform his contract with William to be good, then John's promise would be no consideration; but only because, even though supported by sufficient consideration on the other side, and satisfying all ordinary requisites, it was deprived of validity by the positive rule, and therefore made incapable of having any value in contemplation of law. But again, no such positive rule can be produced."

Pollock is combating an argument which maintains that the second bilateral contract cannot arise, and why? Because the promise of the obligated party cannot be a consideration for the third party's promise. But Pollock says, surely no one will deny that payment by a third party will support a promise by the already obligated promisor, because if not it must be that such promise is prohibited by some special rule of legal policy. But, he further argues, if such payment can create a promise by the already obligated party, it must be possible for him to bind himself by such promise, and, if so, then there is no good reason why such promise cannot constitute a consideration for the third person's promise.

There seems to be no escape from this conclusion. Either the obligated person can make the new binding promise, in which event there is no reason why such promise should not constitute a valid consideration for a third person's promise, or, if this is not so, and the obligated party cannot make such promise, what possible magic can there be in the payment of \$5 which shall cause this non-existing power to

arise. If he cannot promise, how can a payment of \$5 give him this power? ¹

Professor Williston, in a note ² to the above-quoted text of Pollock, says:

"The difference is this: John's promise to Peter when given in exchange for a payment of money by Peter is binding because the payment of money is good consideration. Whether the promise of John in this case could be good consideration is immaterial, for the payment of money needs no consideration. The promise is not illegal and the parties acted under no mistake. If, however, Peter gives a promise instead of money there must be good consideration on both sides. Not only must Peter's promise be of the sort which the law regards as sufficient, but John's also must be, or neither is enforceable, and the disputed question is whether John's promise is sufficient consideration to support Peter's promise."

Now Pollock is arguing that John's promise is binding and hence a valid consideration for Peter's promise, and it is with reference to this argument that Williston writes his note.

It is claimed that as John is already obligated he cannot bind himself again. In other words he cannot make a binding promise to do the obligated thing. If he cannot so bind himself then it follows that he cannot give a promise to Peter which will be a valid consideration. Assuming that situation, Williston and the above-quoted reviewer seem to think there is some potency in the payment of money by Peter whereby John will now upon its receipt be able to bind himself although he could not before. The trouble does not lie with Peter. He is under no disability. It is John whose promise is in question. If John can bind himself, as Pollock contends, then there is no difficulty, and his promise will sustain Peter's. But if he cannot do so, no money from Peter will enable him to change the situation.

¹ It is evident that Langdell perceived the fallacy, as is shown by his statement concerning Pollock's position. 14 Harv. L. Rev. 502, n. 1.

² Williston's Wald's Pollock, 208, n. 18.

Williston says John's "promise is not illegal"; probably so, but can it be binding? If yes, then it is a valid consideration; if no, then it is not.

Williston says, "Whether the promise of John in this case could be good consideration is immaterial, for the payment of money needs no consideration." What of it? The sole question is, can John bind himself, does his promise amount to anything? If it does, he and Peter can exchange their promises. If it does not, then what does Peter get for his money?

Of course Williston does not mean to contend here that Peter's money will be paid for John's mere moral promise, because Pollock is arguing that John can make a legal promise.

Dean Ames takes the position¹ that either doing or promising to do an already obligated act is a valid consideration, and in the case of a new promise, whether such promise is given to the original promisee or to some third person.

English leading cases support this contention, but the law of this country is almost entirely opposed to Ames' view. His arguments are ingenious and persuasive. They have attracted attention, but it can hardly be said that they have received general recognition. This does not prove that they are not sound, however.

The fact is that the strict doctrine of consideration is not, and cannot be, applied consistently under all circumstances.

Thus in the cases involving a question of subscription,² the difficulty arising from the fact that the various promises after the first are to do acts for which the promisee is already obligated, is never even mentioned in the various views taken by different Courts.³ In cases of suretyship the

¹ 13 Harv. L. Rev. 31.

² Langdell, Contract, § 186.

³ In speaking of subscriptions, Tuck, J., says in *Gittings v. Mayhew* (6 Md. 113, at p. 131): "In some cases the Courts in furtherance of what they deemed a recognized public policy, have felt themselves warranted in relaxing to some extent the rigor of the common law, and have held the subscribers liable, when perhaps upon strict principles there was not a legal consideration."

same act is often the consideration for two distinct promises from two persons. Then there are the compromise cases, and those of composition with creditors, which are clear exceptions to the strict rule. So are the gratuitous trust cases, which are in reality cases of gratuitous promises which the Courts sustain by this device. These are a few of the instances which lead to the thought that if we say frankly that Dean Ames advocates a theory whereby the rigors of the common law doctrine are softened, and that his theories are in reality a modification of the law, then we may more easily accept them. We can also more readily recognize, as is surely the fact, that the Courts are more and more abrogating the doctrine of consideration, and have never logically and consistently enforced it.

This tendency is a good one, and doubtless our law must ultimately approach the more reasonable rules of the continental systems, and do away with our antiquated, technical, and historically accidental requirement of consideration. This will not be done openly and confessedly, but by illogical argument and treatment, until the rule in the course of years may disappear.

Lord Mansfield failed long ago to accomplish this desirable result, which has caused a delay of one hundred and fifty years, but the tendency towards this end is very marked at the present time, and these articles by such a master of his subject as Dean Ames, only serve to make this more evident.

§ 37. (3) *The question discussed whether a person under obligation to do a certain thing can make the doing of that thing the consideration for a new promise from the party to whom he is under obligation.*

Of course the parties may mutually agree to give up an existing contract and make a new one. This they can do by a new bilateral contract. Whether they have done so in any given instance is a question of fact. To say, however,

that in many of the cases in the books there is any such consent is the purest fiction.¹

It may be argued that convenience demands the recognition by law of the proposed new arrangement. But, on the contrary, by such recognition the courts would seem practically to sanction blackmail.

A, an experienced builder, contracts to erect a building for \$50,000 and finish the work by May 1st. The promisee, finding that he can advantageously put up the structure at that price, signs the contract. Building materials increase in price, and the builder on February 1st refuses to complete unless he is promised \$20,000 more. Non-completion of the building means ruin, the owner chooses the lesser evil and stands the loss. In other words, although he received only that to which he is entitled, the law is asked to tax him \$20,000 for nothing. True, he need not promise, if he prefers ruin. But, if he does, he is bound, although nothing new is furnished, and he receives only that covered by his first promise. If we are to adhere to the doctrine of consideration, there is nothing here which has been given in exchange for the second promise.

It may be said that otherwise the man may break his promise. It is true that our procedure does not always adequately protect against a breach of promise, but certainly the Courts do not sanction such breach, and in theory of law a promise should be kept, not broken.

The suggestion may be made that where advantage is taken of the necessities of the promisee the Courts should not sustain the new arrangement, on the ground of public policy. But where shall the line be drawn? If both parties have voluntarily given up the old contract there is no question as to the validity of the new, but it is in the very cases where the supposed rescission is not voluntary that we have the difficulty, and if the promisee unwillingly yields, then there is always a greater or less degree of compulsion.

There seems to be more reason here for a rigid applica-

¹ As in *Vanderbilt v. Schreyer*, 91 N. Y. 392.

tion of the rule as to consideration than is usually found. The majority of cases in this country refuse to allow recovery under such circumstances, and they seem sound.¹

But an exception has been made in which there appears to be general acquiescence. This exception was described in *King v. Duluth M. & N. Ry. Co.*² as follows:

"But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration."

There is no sound principle upon which this can be based. Confessedly the contractor would be liable if he broke such a contract, and these exceptional circumstances would be no defense. How can performance constitute any more valid consideration than in the ordinary case? The exception is illogical and unsound. Either a Court should take the position squarely that there is always consideration in the cases discussed above, or else hold that there is no consideration in any of them.

§ 38. MORAL OBLIGATION AS A SO-CALLED MORAL CONSIDERATION

At one time it was supposed that a moral duty was sufficient to sustain a promise, and such duty has been called moral consideration. The idea received support from the views of Lord Mansfield, but the illustrations generally given by him were those of some existing legal obligation barred by

¹ *Ayres v. C. R. I. & P. R. Co.*, 52 Iowa, 478; *Feltman v. Parker*, 10 Ind. 474, see *contra*; *Abbott v. Doane*, 163 Mass. 433, and cases cited by Court; *Manetti v. Doege*, 48 N. Y. App. Div. 567.

² 61 Minn. 482, 487.

a rule of law. His language, however, was broad enough to cover cases of pure moral duty. Subsequently, in 1813, this doctrine was carried to its fullest extent in the case of *Lee v. Muggeridge*,¹ in which case Mansfield, C. J., said:

"It has been long established, that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action. The only question therefore is, whether upon this declaration there appears a good moral obligation."

This anomalous doctrine was finally met and practically banished from our system of law in 1840 by the case of *Eastwood v. Kenyon*.² In that case Lord Denman, C. J., approves the note to the case of *Wennall v. Adney*,³ and further says:

"The eminent counsel who argued for the plaintiff in *Lee v. Muggeridge*⁴ spoke of Lord Mansfield as having considered the rule of *nudum pactum* as too narrow, and maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down. If the latter, the note to *Wennall v. Adney* shows the deduction to be erroneous. If the former, Lord Tenterden and this Court declared that they could not adopt it in *Littlefield v. Shee*. Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."

In the note to *Wennall v. Adney*, after a review of the cases on this subject, it is said (at p. 251):

"In the older cases no mention is made of moral obligation; but it seems to have been much doubted whether mere natural affection was a sufficient consideration to support an assumpsit, though coupled with a subsequent express promise. Indeed Lord Mansfield appears to have used

¹ 5 Taunt. 32, 36.

² 3 B. & P. 247.

³ 11 A. & E. 438.

⁴ 5 Taunt. 32.

the term 'moral obligation,' not as expressive of any vague and undefined claim arising from nearness of relationship, but of those imperative duties which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance from legal liability. On such duties, so exempted, an express promise operates to revive the liability and take away the exemption, because if it were not for the exemption, they would be enforced at law through the medium of an implied promise. In several of the cases it is laid down, that to support an assumpsit the party promising must derive a benefit, or the party performing sustain an inconvenience occasioned by the plaintiff."

This note has been universally cited with approval in the highest courts of England and this country. It sums up the result of the cases thus:

"An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."

It may be stated as the true principle that when an existing legal claim is barred by some statute or rule of law, a subsequent promise to pay such claim is a waiver of the bar or defense thus given, and an action may be brought on the original obligation, the subsequent promise being treated as such waiver. The cases arising under this rule are: 1. Those barred by the Statute of Limitations. 2. Those barred by bankruptcy or insolvency discharges. 3. The defense of infancy. In these instances the intervening rule of law is for the benefit of the defendant, and therefore can be waived by him.

Except as thus understood and explained, the so-called doctrine of "moral consideration" is generally regarded as

done away with in all jurisdictions. Thus Professor Langdell says¹ that since 1840 "the notion of moral consideration has received no countenance from any quarter."

In view, however, of some New York decisions, it may be doubted whether we are, after all, quite so well rid of this "notion."

The correct view, on the whole, has generally prevailed, even in New York, and the note to *Wennall v. Adney* has been frequently recognized as sound. Thus in *Wilbur v. Warren*,² it is said:

"It seems to be the general doctrine that an executory agreement supported only by a meritorious, as distinguished from a valuable or pecuniary consideration, cannot be enforced either at law or in equity, and an executory covenant falls within the operation of the rule."

But the case of *Bentley v. Morse*³ was decided purely on the ground of moral obligation, there being no consideration, and in 1863, in *Goulding v. Davidson*,⁴ the Court of Appeals decided that the promise of a widow to pay for goods delivered to her on her personal credit during coverture was enforceable. As the goods were furnished during coverture no action could have been sustained against her therefor. Balcom, J., says:

"It seems to me that the defendant's moral obligation to pay this debt is so interwoven with equities as to furnish a good consideration, both upon principle and authority, for her promise to pay it."

There is also some loose talk in several cases about the moral duty of a father to support his child, and in *Buchanan v. Tilden*⁵ there are some remarks about the moral duty of a husband toward his wife, but these decisions do not necessarily involve the doctrine.

Phrases which one finds scattered through the cases seem to indicate an indefinite and vague idea that in some way

¹ Contract, § 74.

² 14 Johns. 468.

³ 158 N. Y. 109.

⁴ 104 N. Y. 192, 196.

⁵ 26 N. Y. 604, 611.

Courts of equity will support the so-called meritorious, or moral, consideration. But these Courts are governed by the same rules as courts of law in regard to the formation of a contract. There is no principle upon which they can find a consideration or dispense with one, in instances where a court of law cannot do so.

§ 39. COMPROMISE AND FORBEARANCE¹

Forbearing to sue upon an existing cause of action on request and in exchange for a promise, is a valid consideration. This proposition presents no difficulty, as an existing right is surrendered. The forbearance may be either for a stated or a reasonable time.

If a promise to forbear is asked, forbearance without such promise is not enough. A promise and not an act is requested. Under such circumstances there must be a bilateral contract, if an obligation arises at all. This was the ground of decision in *Strong v. Sheffield*.² The Court found that forbearance was not sufficient in that particular instance, because "It was a case of mutual promises and so intended." As a promise to forbear had been demanded in the offer, nothing but such promise would do. The Court, however, recognized that forbearance, if requested, would furnish a valid consideration, saying, "Nor is it essential that the creditor should bind himself at the time to forbear collection or to give time."

It often happens that parties desire to avoid litigation and therefore compromise their disputed claims. In pursuance of this plan they make some mutual arrangement, either for forbearance on one side or for a foregoing of some portion of the right claimed on either side. In many jurisdictions such compromises are now supported, when made in good faith. In case of litigation upon promises made pursuant to a compromise, no testimony is admitted as to the

¹ For a full digest of the cases on this topic see Williston's *Wald's Pollock*, 213, n. 22, 23.

² 144 N. Y. 392, 396.

validity of the original claim. This amounts to an exception to the general law requiring consideration.

Public policy seems to be the true ground for sustaining these compromise arrangements.

If the doctrine of consideration is to be logically and consistently applied, we must hold that a compromise can only be sustained where an original cause of action exists. The good faith or genuine belief or doubt of the parties can have no effect upon the question.

To give up, or forbear to sue upon, a supposed cause of action which turns out to have no existence, can be no consideration for a promise. The mere belief that some right exists cannot make the supposed giving up of such non-existent right a consideration. Nothing has been surrendered, and hence no consideration furnished.

Accordingly in *Ecker v. McAlister*¹ the Court said:

"The law is well settled that a mere forbearance of a claim or demand, before suit brought, which is not in fact a legal demand, is not of itself a sufficient consideration to support a promise."

The early English cases consistently so held.²

But such a conclusion, although logical, does away with any reason for compromise. One settles a disputed claim in order to close the matter and prevent litigation. If the original doubtful question can still be litigated in a deferred suit, nothing has been gained. No one would knowingly make such an arrangement, and no compromise would be possible.³

¹ 54 Md. 362, 372.

A few States have taken this view, and refuse to recognize an exception to the general doctrine. See, for instance, *Foster v. Metts*, 55 Miss. 77, and cases cited in Williston's note, cited *supra*, at p. 115, n. 1.

² See Langdell, *Contract*, §§ 56, 57.

An exception is also there pointed out, to the effect that if the compromised claim was in litigation at the time of the compromise or forbearance it was presumed to be well founded and the burden of showing the contrary was upon the defendant.

³ *Finch v. Farmers' Bank*, 178 Pa. St. 154.

This result was so unfortunate that it is not strange to find the strict logical rule modified, and an exception established in England and many of the United States whereby compromises are sustained. This is a wise exception, and commends itself as reasonable. It is essential to show a genuine dispute, with each party thereto believing, in good faith, that his claim is valid, or at any rate reasonably doubtful. If one or both of the parties know the claim to be invalid, the essential good faith is lacking, and the alleged compromise will not be sustained.¹

Where no definite time is fixed for a requested forbearance there may be a question as to the intention of the parties. As a unilateral contract is contemplated, the act must be performed before there can be a contract. Hence forbearance forever cannot constitute a consideration, because there can never be complete performance.² The sound view is that the parties contemplate forbearance for a reasonable time,³ and it is a question of fact whether there has been such forbearance during the continuance of the offer. Of course the language of a proposed contract may preclude this construction. Then there can be no contract.⁴

§ 40. SUBSCRIPTIONS

*"Where something has been done, or some liability or duty assumed, in reliance upon the subscription, in order to carry out the object, the promises are binding, and may be enforced, although no pecuniary advantage is to result to the promisee."*⁵

*"Nor need a request to the promisee to perform the services be expressed in the instrument; it may be implied."*⁶

¹ Callisher v. Bischoffsheim, L. R. 5 Q. B. Div. 449; Miles v. New Zealand Alford Estate Co. 32 Ch. Div. 266.

² See Langdell, Contract, § 59.

³ Howe v. Taggart, 133 Mass. 284; Trader's National Bank v. Parker, 130 N. Y. 415; Langdell, Contract, § 59.

⁴ For the difference between a requested consideration and a condition, see *supra*, p. 73.

⁵ Lathrop, Receiver, v. Knapp, 27 Wis. 214, 231.

⁶ Keuka College v. Ray, 167 N. Y. 96, 100.

The above quotations express the law as it is generally enunciated, these documents being enforced as obligations with practical unanimity whether they are given in the form of a subscription, a promissory note, or a simple expression of intention.¹ It is generally required that the promise should be accepted and acted upon.² When the form is that of a subscription, some Courts find mutual promises,³ that is, bilateral contracts, and so satisfy themselves as to consideration. The general view seems to be that the note or subscription may be withdrawn before it is accepted or acted upon, but not thereafter.

The majority of subscriptions are for charitable purposes, but sometimes they are for purely business objects. The Courts seem to draw no distinction between them. Some of the business subscriptions form contracts, even if general rules be strictly applied.⁴

In spite of the expenditure of much ingenious argument on the part of the Courts, one is led to the conclusion that these cases must be regarded as exceptions to the general rule which requires consideration, and that they are practically *sui juris*.

The ordinary subscription is for a charitable or religious purpose, and clearly intended as a gift. To say that in these cases there is a request, express or implied, is pure fiction. For instance a pastor desires to raise money to pay off a church mortgage, preaches a begging sermon, and then sends round a subscription paper. It requires the exercise of a lively imagination to suppose the subscribers are requesting the pastor to raise money or obtain other subscriptions.

Some cases advance the theory that the various parties

¹ Maine Central Institute v. Haskell, 73 Me. 140.

² Pres. Church v. Kendale, 121 Mass. 528. In this case there was nothing to show that there was any acceptance, or that anything was done pursuant to or in reliance upon the subscription.

³ Lathrop, Receiver, v. Knapp, 27 Wis. 214, 231.

⁴ Davis & Rankin v. Campbell, 93 Iowa, 524; Martin v. Meles, 179 Mass. 114. There seems to have been a contract in these cases upon ordinary principles.

have exchanged promises, and that there are, therefore, as many bilateral contracts as there are pairs of signers.

It is not easy to work out such contracts. If A and B are the first and second subscribers, then their promises to one another seem to exhaust all they have to promise on that subscription. When C signs, he receives nothing from A and B. They are already bound. The more parties signing, the more complication there is in working out the exchange of promises.

In addition to this there is a difficulty as to the parties who are to join as plaintiffs. In jurisdictions which do not admit the doctrine of third persons as beneficiaries, the action could not be brought by the religious or charitable organization, and if the other subscribers must bring the suit, do they do so jointly or may anyone of them sue?

The vital objection is that a charity is intended, and there is no thought of exchanging promises as a juristic act.

Of course these difficulties have been felt by intelligent judges, and many of them indicate by their own statements that they are perfectly well aware of the fallacy of their own arguments.

Thus in *Trøy Academy v. Nelson*¹ the Court says:

"We can hardly conceive of a case where the doctrine of estoppel has a more just and equitable application. For it is of the very essence of such estoppel 'that a party shall not be permitted to contradict an act which operates as a fraud on his part, or as an injury to others, whose conduct has been injured thereby.' Nor was it ever designed, in saying that a party may avoid an improvident contract by showing that no consideration existed therefor, that that principle should ever become an instrument in the hands of one, for the commission of fraud upon others."

After this extraordinary exposition of the rule as to consideration, the Court proceeds to argue, quite unconvincingly, that a valid consideration did exist in that case.

In *Albert Lea College v. Brown*² the Court says, referring to

¹ 24 Vt. 189, 193.

² 88 Minn. 524, 533.

earlier cases in conflict with the modern view of these voluntary promises, "They apply with too much strictness the general principles of law applicable to ordinary contracts,—usual and everyday business transactions — where a substantial pecuniary consideration or benefit to each of the parties is the object that they have in view in entering into contracts."

When these subscriptions first came before the Courts, there was a general tendency to refuse recovery because they were mere voluntary promises unsupported by consideration.

While it seems wise and just to support such actions, and the modern view is eminently proper, it would be much better to say frankly that these cases form an exception to the general rule, and that they constitute another instance where the Courts have refused to apply the strict rules of consideration, and have modified the doctrine.

§ 41. PAST CONSIDERATION¹

So-called past consideration is, in truth, no consideration. An act executed and performed without any previous offer cannot constitute a consideration for a subsequent promise. Such past act could not be performed in exchange for the future promise, nor could such promise be given for and in reliance upon an act completed before the promise was even in contemplation. An offer calls for some specific consideration, and this cannot be given if it has already been furnished.

Thus in *Mills v. Wyman*,² the action was brought to recover compensation for board and care of defendant's adult son, who fell sick among strangers, and was cared for by the plaintiff. Subsequently the defendant wrote to plaintiff promising to pay him for expenses incurred. The Court held that

¹ Professor Langdell (Contract, § 90) says that the notion of past or executed consideration grew out of the use of the action of *assumpsit* for simple contract debts. This action required a promise and to meet this a fictitious promise was invented, there being none in reality. The debt already existed and this was held to support the subsequent fictitious promise.

² 3 Pick. 207.

no contract arose. The board and care were given before the promise was made, which was consequently without consideration. This result was reached in early English cases,¹ and still expresses the law.

For many years the erroneous doctrine prevailed that a past consideration performed upon request would always sustain a subsequent promise given by the person making such request. It was supposed that the mere fact of request was sufficient, as a rule of law, no matter what the facts might fairly indicate.² This idea has been repudiated in most jurisdictions.³

Where, however, the circumstances accompanying a request reasonably indicate a promise, one may be implied in fact, and will be as effective as though expressed in words.⁴ In these cases a contract to pay a fair price for the services arises immediately upon performance of the act requested. A subsequent promise of a sum certain for such services is without consideration, and of no force except as some evidence of their value.⁵

¹ *Hunt v. Bate*, Dyer, 272.

² *Riggs v. Bullingham*, Croke, Eliz. 715; *Lampleigh v. Brathwait*, Hobart, 105; Langdell, Contract, § 90.

³ *Roscorla v. Thomas*, 3 Q. B. 234.

⁴ Holmes, C. J., says in *Moore v. Elmer*, 180 Mass. 15: "The modern authorities which speak of services rendered upon request as supporting a promise must be confined to cases where the request implies an undertaking to pay and do not mean that what was done as a mere favor can be turned into a consideration at a later date by the fact that it was asked for."

⁵ Erle, C. J., says in *Kennedy v. Broun*, 13 C. B. n. s. 677, 740: "In *Lampleigh v. Brathwait*, it was assumed that the journey which the plaintiff performed at the request of the defendant, and the other services he rendered, would have been sufficient to make any promise binding if it had been connected therewith in one contract; the peculiarity of the decision lies in connecting a subsequent promise with a prior consideration after it had been executed. Probably at the present day, such service on such request would have raised a promise by implication to pay what it was worth; and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount." Quoted in Williston's Cases on Contract, Vol. I, p. 315, n. 2. The evidence would not necessarily be conclusive and might be disregarded by the jury.

But a request does not necessarily indicate a promise. If the circumstances do not warrant the inference, none should be drawn. Should a farmer request his adult son, living at home, to milk the cows, this would not, *prima facie*, indicate a business proposition, while it might well do so were the request made to a passing workman, seeking employment. In other words, a request does not give rise to a conclusion of law, but justifies an inference of fact when the situation warrants.

If one voluntarily does something which another was legally bound to do, and the one thus bound subsequently promises to pay the former, it is said that this ratifies the act, and that a previous request will be implied. The cases hardly bear out such contention, and the few decisions cited seem to be based on the exploded doctrine of moral consideration.¹

Past consideration must not be confused with consideration furnished pursuant to an offer, or contemporaneously with or in exchange for a promise. Thus in unilateral contracts there is first an offer, and then the performance of the act requested. No contract arises until the act is completed, but such act is furnished as consideration for a contemplated promise. It may even happen that no previous offer is made, but something, for instance a book, is tendered for a price and accepted. Under such circumstances the contract arises upon acceptance of the book.

§ 42. COMPOSITION WITH CREDITORS

This subject is now very generally regulated by statute. At common law such compositions were sustained.²

¹ Benjamin, Contract, p. 30, states this doctrine as an exception and cites (*inter alia*) Gleason v. Dyke, 22 Pick. 390; Doty v. Wilson, 14 Johns. 378.

Pollock disapproves the proposition and considers the authorities both "scanty" and "unsatisfactory." Williston's Wald's Pollock, p. 201.

² Lynn v. Bruce, 2 H. B. 1, 317; Good v. Cheeseman, 2 B. & A. 328; Brown v. Farnham, 48 Minn. 317; Farrington v. Hodgdon, 119 Mass. 453; White v. Kuntz, 107 N. Y. 518, 524; Wheeler v. Wheeler, 11 Vt. 60.

Here, again, there is difficulty in applying the doctrine of consideration, and the topic causes some of the perplexities which arise in the cases upon subscriptions.¹

So, too, the Courts have held² that the payment of a sum less than the amount of a liquidated debt is not a sufficient consideration to support a promise to accept such sum in satisfaction of the entire debt. It amounts only to a payment *pro tanto*. And yet when several creditors do that which is invalid when done by one only, the arrangement is sustained. This incongruity was pointed out in *Lathrop v. Knapp*.³

The general view of the Courts is well brought out by *Vanderburgh, J.*, in *Brown v. Farnham*,⁴ as follows:

"The composition deed is an agreement between the creditors and the defendant, which involves rights and interests common to all the creditors who join in it. It is an agreement that each shall receive the amount or consideration stipulated for, and nothing more, as the basis of the debtor's discharge from the debts due to such creditors. Each creditor must be presumed to act on the faith of the engagement of the others, and the beneficial consideration to each is the obligation of the rest to forbear; and the debtor secures to them a common fund for the benefit of all, so that they are mutually bound, and there is consideration as between themselves, of which the debtor is also entitled to avail himself."

This class of cases forms another exception to the strict rule as to consideration: The decisions, as in compromise cases, are really based upon public policy. "*Interest rei-publicae ut sit finis litium.*"

§ 43. INFANT'S PROMISE AS A CONSIDERATION

It has been held uniformly that an infant can contract. But ordinarily he is not bound⁵ thereby unless, after reaching

¹ See *supra*, p. 119.

² See discussion, *supra*, p. 99.

³ 27 Wis. 214.

⁴ 48 Minn. 317, 318.

⁵ *Englebert v. Strauss*, 137 N. Y. 148, 152; *Rice v. Boyer*, 108 Ind. 472; *McDonald v. Sargent*, 171 Mass. 492.

his majority, he renews the promise either expressly or by appropriate action. The contract arises when the infant makes the original promise, and the subsequent ratification is regarded as a waiver of the defense which existed.¹ In other words, the Courts treat the promise of an infant as voidable, not void.

While this is the well-settled law, it is not easy to see how it can be worked out on principle. The adult² is bound by this promise, but no consideration has been given. It is said that the infant has furnished his voidable promise, thus making a bilateral contract. But what sort of an obligation is that which binds the obligor at his option only?

If this were a matter of first impression, it would seem that an infant could not contract, and that neither infant nor adult would be bound. This was the result when a married woman at common law endeavored to contract. No obligation arose. However, the question is no longer open.³

As is said above, an infant cannot in ordinary cases bind himself by his contract. When, however, such contract will result in a status, such as marriage, apprenticeship, enlistment, and the like, the infant is bound by the obligations imposed by such status. The contract leading up to such status does not bind him.⁴

Also so-called contracts to perform a legal duty are binding upon an infant.⁵ Thus in bastardy cases, where the infant promises to do what the statute would compel him to do. It may be questioned whether these are contracts. True, the promise is to do that which he need not do until the statute is invoked. Nevertheless it is simply a promise

¹ See so-called moral consideration, *supra*, p. 111.

² Union Central Life Ins. Co. v. Hilliard, 63 Ohio St. 478.

³ This question was considered in *Holt v. Ward Clarencieux*, 2 Str. 937, where the Court decided that the infant could make a voidable contract, and the adult was bound.

See also remarks by Langdell, *Contract*, § 82.

⁴ *Hunt v. Peake*, 5 Cow. 475; *Rush v. Wick*, 31 Ohio St. 521; *Warwick v. Cooper*, 5 Sneed, 659.

⁵ *People v. Moores*, 4 Denio, 518.

to do his duty, and the consideration is supposed to be the abstaining from invoking the statute. If this be a contract on the part of the infant, such promise must constitute a valid consideration for a counter promise, as for example to pay him \$500. It is not conceivable that a promise by an adult to pay \$500 in consideration of an infant's doing his legal duty, would be sustained. The obligation of the infant in these cases does not appear to be contractual.

But it is said:¹

"If the legal obligation to do an act exists, he may bind himself by a reasonable contract made for the purpose of discharging that obligation. He merely promises in such a case to do what the law says he shall do."

It seems that this obligation is rather quasi-contractual in its nature.

It is customary to say that an infant is bound by his contract for necessities. This is not correct, however. The obligation in such cases, also, is quasi-contractual.²

§ 44. CONSIDERATION MUST MOVE FROM THE PROMISEE

The class of cases which, under some circumstances, permits a third person, not a party to the contract, to bring an action thereon,³ may raise a doubt as to this proposition.

Heretofore it has been maintained very generally that the consideration for a promise must in all cases move from the promisee. Thus Langdell⁴ says: "The consideration of a promise is a thing given or done by the promisee in exchange for the promise." And from this conception he draws the

¹ *Stowers v. Hollis*, 83 Ky. 544.

² See *supra*, p. 1, note; *Baum v. Stone*, 12 Weekly Dig. (N. Y.) 353; *Gregory v. Lee*, 64 Conn. 407; *Tranier v. Trumbull*, 141 Mass. 527.

Statutes in England and several States of the Union have modified the common law as to infants.

³ For instance, *Dutton v. Poole*, 2 Lev. 211; *Lawrence v. Fox*, 20 N. Y. 268. See for a discussion of this class of cases, *infra*, p. 231.

⁴ *Contract*, § 45. See also *Leake*, *Contract* (3d ed.), p. 532.

necessary conclusion that "it is of the very essence of consideration that it be received from the promisee."¹ He cites *Tweddle v. Atkinson*² and *Exchange Bank v. Rice*³ as his authorities. Therefore, he has in mind cases where a promise is made for the benefit of some third person, and maintains the view that such third person is a stranger to the consideration, and should not be allowed to sue on a breach of the contract.⁴

The Court in *Tweddle v. Atkinson* employs language which sustains Langdell's position. Thus Crompton, J., says (at p. 398), "They (*i. e.* the modern cases) show that the consideration must move from the party entitled to sue upon the contract." Nevertheless, in that case the consideration did move from the promisee, although he was not the plaintiff.

The definition given by Leake⁵ is: "The consideration is the matter accepted or agreed upon as the equivalent for which the promise is made." While Bishop⁶ says: "A consideration is something esteemed in law as of value, in exchange for which the promise is given."

These statements very fairly represent the prevailing view, but neither of them necessarily precludes the idea that the consideration may move from some one other than the promisee.

Williston doubts the rule, and thinks there is no good reason "why A should not be able, for a consideration received from B, to make an effective promise to C."⁷

To work out this suggestion, suppose that A promises to pay B \$100 in consideration of B's promise to C to give him a cow. If this is a contract there are two promises. Such contract is not bilateral, as the promises are not given in

¹ Contract, § 63.

² 1 B. & S. 393.

³ 107 Mass. 37.

⁴ This question is considered *infra*, p. 231.

⁵ Contract (3d ed.), p. 526.

⁶ Contract, § 38.

⁷ Williston's *Wald's Pollock*, p. 241. And see to the same effect Huffcut's note to *Anson's Contracts* (2d Am. ed.), p. 107, n. 1, citing several of the same authorities.

exchange for each other. Therefore, it must be unilateral, and the promise given by each is an act called for by the other. It is not reasonable to suppose that A had in mind a mere moral obligation. Evidently he expected a legal obligation to be given by B to C for the delivery of the cow. Each promise then is given as the consideration for the other, and yet they are not exchanged. Either each is an obligation, or neither is.

Again, suppose that A and B are talking together in the presence of B's uncle. B says to A "in consideration of my uncle giving to me his bay horse, I promise to pay you \$250." The uncle at once says "the horse is yours," and delivers it. Is there a contract here between A and B? B has received that for which he asked in exchange for his proposed promise. Has his offer to A become a promise? Suppose that A had immediately replied to B "I accept," and thus brought about agreement. There would be then mutual assent. Can we say that the horse was furnished as consideration, and if not, why not, under Williston's suggestion?

But suppose the uncle is not present, and rides up just after the offer was made, remarking, in ignorance thereof, "here is my bay horse, take it," and then delivers the animal. In this example the horse is not furnished by the uncle as consideration, but nevertheless there has been agreement between A and B, and the desired horse has been delivered, although not in consequence of the request. Does that change the result?

To hold that there is a contract in any of these cases is a wide departure from the traditional rule as to consideration.

Heretofore the idea has been that the promisor and promisee exchanged promise and consideration between them, and that the promisee received the promise in exchange for something which he furnished to the promisor as consideration.

If this is not so, why is it necessary that anything more than mutual assent shall exist between the parties, provided the desired consideration is supplied from any quarter?

Most of the cases cited by Williston as supporting his proposition do not sustain the contention, but are instances of a promise made for the benefit of a third person who is permitted to bring an action thereon. The promise is made to the person furnishing the consideration, who is thus the promisee, and not to the third person.

In *Rector v. Teed*¹ the consideration was the withdrawal of a will contest, which was done at the request of Teed, and in exchange for Teed's promise to pay \$500 to the plaintiff. There was a promise made to Teed, who furnished the consideration.

So also in *Bell v. Sappington*² the consideration was in fact furnished by the promisee Sappington, but the Court said:³

"If there is a valid consideration for the promise, it matters not from whom it moved, the promisee may sustain his action, though a stranger to the consideration."

The Georgia Civil Code, § 3664, was cited as authority. As this remark is based upon a statute, it is no authority for a general rule of law. But, evidently, the Court has in mind actions by third persons for whose benefit the contract is made, and does not necessarily intend to say that the consideration need not move from the promisee, but merely to indicate that even so a third person may sue for breach thereof.

*Schmincher v. Sibert*⁴ was brought to foreclose a mortgage. The property had been conveyed by deed containing a clause

¹ 120 N. Y. 583.

The defense was lack of consideration. At p. 587 the Court makes this peculiar statement, "Moreover, as the agreement recites a consideration, the burden of proof was on the defendant to show that there was none."

This was neither the case of a sealed instrument nor of negotiable paper. The dictum is not a correct statement of the law.

It is elementary that a plaintiff suing for a breach of a contract must establish each controverted element thereof: unless he establishes a contract, there can be no breach.

² 111 Ga. 391.

³ *Idem*, at p. 393.

⁴ 18 Kan. 104.

assuming the mortgage. The promise in the assumption was actually made to the grantor who furnished the consideration, and was the promisee. But the Court held that the mortgage holder could appropriate this promise as security.

But there are two cases which may be regarded as some authority for the contention that the consideration need not move from the promisee.

In *Williamson v. Yager*¹ the Court said:

"It is also well settled that a consideration moving from one person will uphold a promise to, or an agreement made with, a third person."

No authority is cited, and the statement is only a dictum, as the consideration there moved from the promisee.

In *Palmer Savings Bank v. Insurance Co.*,² the owner of real property, upon which there was a mortgage held by the plaintiff, received a fire insurance policy from the defendant company. This policy was made payable, in case of loss, to the plaintiff "mortgagee as its interest may appear." The property, having been sold in the meantime, was destroyed by fire, and the plaintiff brought this action on the policy.

The Court says that in such a case as this, —

"the mortgagor acts both for himself and the mortgagee. The mortgagee is not an entire stranger to the consideration because the mortgagor in effecting the insurance has only performed a duty which he was under to the mortgagee, and for the performance of which he was paid by the loan which was secured by the mortgage."

The Court then proceeds to say that the effect is the same as though the owner had assigned.

This raised the question how the assignee could sue in Massachusetts in his own name. The opinion continues:

"While in this Commonwealth the rule is held strictly that no one can sue or be sued on a simple contract, who is

¹ 91 Ky. 282, 286.

² 166 Mass. 189, 194..

not a party to it, either disclosed or undisclosed, yet it is not in all cases necessary that the consideration should move from the promisee to the promisor in the ordinary sense of these words. In a novation no consideration moves from the promisee to the promisor.¹

No authorities are cited for the last proposition.

In this case the real situation seems to be that the insurance Company by its policy promised the owner to pay the mortgagee bank its interest in case of loss. That is to say, the consideration really moved from the promisee, and the promise was made for the benefit of a third party, namely, the mortgagee.

Looked at in this way, the case does not sustain the contention that the consideration need not move from the promisee. Owing to the fact that the Massachusetts Court has held strictly against allowing such third party to bring an action on the promise, this difficulty was surmounted by the fiction of an assignment. This involved a fresh question as to how the assignee could sue in his own name. To meet this the Court indulges in further artificial reasoning to show that the plaintiff really was a party to the contract. In order to straighten out this final imaginary position, the remark was made that in some cases the consideration need not move from the promisee.

The case is hardly a convincing authority upon this particular point. In fact the statements with reference to this question are little better than dicta.

If we are to maintain the doctrine of consideration, there must at least be something furnished by the promisee in exchange for the promise. To give up this idea seems to eliminate the rule and its reason.

It may be that here, as elsewhere, we see the process of gradually changing the law. As a step towards abolishing the rule requiring consideration, we may welcome the suggestion,

¹ The Court is mistaken in its analysis of novation. See article by Dean Ames, 6 Harv. L. Rev. 184.

but it does not seem to accord with the existing technical rule.

Up to this time the question appears to have arisen in connection with actions by third person beneficiaries, and whatever conclusion may be reached as to this class of cases, there is no necessity to invoke any such novel rule in connection with them.

III. CAUSES PREVENTING THE FORMATION OF CONTRACT

§ 45. THERE IS NO CONTRACT WHEN NEITHER PARTY INTENDS A JURISTIC ACT

Where neither party intends a juristic act, there is no contract even though otherwise one would arise. Thus, where parties are joking, and one gives a check or a note for a silver watch;¹ so, where in sport a mock marriage is celebrated.² So also in cases of social intercourse, there is no intent to contract on either side, although there may be the form of contract.³ But an invitation to dinner might be a genuine offer, if it were understood between the parties that the one invited was to come in pursuance of his business as entertainer, and the like. In each case it is a question of fact whether the parties contemplate a juristic act or not.

§ 46. IF THERE IS A REASONABLE MISTAKE AS TO A MATERIAL PART OF THE SUBJECT MATTER OF THE PROPOSED CONTRACT THERE IS NO AGREEMENT, AND NO CONTRACT CAN ARISE

The offer contemplates one state of facts, the acceptance another, and hence there is no meeting of the minds. The mistake, however, must be of such a character that a reasonable man with normal prudence might make it, and not

¹ *Keller v. Holdermann*, 11 Mich. 248.

² *McClurg v. Terry*, 21 N. J. Eq. 225.

³ *Williston's Wald's Pollock* (3d ed.), p. 3.

only so, but each party must have been genuinely and reasonably mistaken as to what the other understood.

Thus, where parties were negotiating for the sale of a horse, the owner named \$160 as the price. They separated, and, meeting the next day, the offeree asked, "Did you say \$60?" The offeror, understanding that there was doubt only as to the decimal, replied, "Yes." Supposing the parties to be acting in good faith, there would be no contract, and so the Court held.¹ It is true that the offeree, as a reasonable man, is justified in supposing that the offer is \$60, because the answer "yes" to such a question would fairly indicate that a man means what he says. But the peculiarity of this case is that the offeror, as a reasonable man, is justified in his supposition that his affirmative reply indicates \$160.

If, then, we are to find in the action of the parties, the equivalent of mutual assent, although contrary to the intent of one of them, this action must be of such a character as not only to justify the party relying thereon in the reasonable belief that assent is indicated on the part of the actor, but the situation must involve a further element, namely, that the actor himself, as a reasonable man, ought to know that his actions or words will fairly indicate assent on his part.²

These general principles are well settled, and easily comprehended, but difficulties may arise in their application. Thus probably it will not be disputed that there is no mutual assent where there exists a justifiable mistake made by one party as to the identity of the person with whom he is con-

¹ *Rupley v. Daggett*, 74 Ill. 351.

² Holland (*Jurisprudence*, 11th ed., p. 263) sums up his discussion on this subject as follows: "The question in these cases should always be: Was the expression of one party such as should fairly have induced the other to act upon it?" This statement, however, would not cover such a peculiar case as *Rupley v. Daggett*, where the expression "60" might well have induced the hearer to suppose this meant just what was said, and he might fairly have been induced to act upon it. It would seem, then, that Holland's formulation is not sufficiently broad. Perhaps it might be phrased thus: Was the expression of one party such as should fairly have induced the other to act upon it, and ought he to have known that the other might reasonably act upon it?

tracting. If A intends to contract with B, and justifiably supposes he is doing so, but it turns out that the other party is C, there is no contract. In the case of *Stoddard v. Ham*,¹ the plaintiffs supposed they were contracting with the defendant, although their dealings were with one Leonard, whom they believed to be the agent of Ham. It developed later that Leonard was acting for himself and not as agent. The Court there held that the plaintiff's mistake was not reasonable as matter of fact, and hence that there was a contract with Leonard. But if the situation had justified the mistake there would have been no contract, because the plaintiffs had no intention of contracting with Leonard, but with someone else. The mistake, then, was not as to his identity, but as to the agency.

When the intent exists on the part of an individual to contract with the personality before him, no mistake as to qualities or characteristics of that personality can prevent the contract from arising. Thus the erroneous idea that such personality is Richard and not Peter, is white and not black, will have no effect. Suppose that one Poor Pape, of Dayton, Ohio, goes to a Boston merchant and introduces himself as Rich Pape, who is a rich man and brother of Poor Pape. The merchant, believing that he is Rich Pape, agrees to send an assignment of goods addressed to Rich Pape at Dayton, Ohio. Going to another merchant in Boston he introduces himself as Poor Pape, but falsely says he is the agent of his brother, Rich Pape, and the merchant negotiates with him as agent, and agrees to send the goods as in the other case. The goods are sent in each instance directed to Rich Pape at Dayton, Ohio. On their arrival Poor Pape in some way obtains possession of them from the transportation company.

In an action of tort by each merchant against the transportation company, the first should fail because there was an actual contract with Poor Pape, although there was a mistake as to his identity. The merchant intended to con-

¹ 129 Mass. 383.

tract with the personality before him. Therefore the defendant delivered the goods to the owner, and was justified in so doing. The second has a cause of action, because there was clearly no contract, and hence the defendant company committed a tort in delivering to Poor Pape, who in that case was not the owner. The merchant did not intend to contract with the personality before him, he was not mistaken in regard to the identity, and, as there was, in reality, no agency, there could be no contract. This result was reached by the Massachusetts court,¹ and the decision was sound.

But in the case of *Cundy v. Lindsay*,² the Court reached a conclusion which seems to be in conflict with the theory of *Edmunds v. Transportation Co.* One Alfred Blenkarn wrote from London to Lindsay & Co. on the subject of the purchase from them of goods of their manufacture. His letters were written as from "37 Wood Street, Cheapside," where he pretended to have a warehouse, but in fact occupied only a room on the top floor. The name signed to these letters was always without any initial representing a Christian name, and was so written as to appear to be "Blenkiron & Co." There was a highly respectable firm of W. Blenkiron & Son carrying on business in Wood Street, — but at No. 123, and not at 37. Messrs. Lindsay, who knew the respectability of Blenkiron & Son, though not the number of the house where they carried on business, answered the letters and sent the goods addressed to "Messrs. Blenkiron & Co., 37 Wood Street, Cheapside," where they were taken in at once.

The Court held that there was no contract for these goods, and hence no title passed. The Lord Chancellor (Lord Cairns) saying:

"They [the jury] have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the

¹ *Edmunds v. Merchants' Dispatch Transportation Co.*, 135 Mass. 283.

² L. R. 3 A. C. 459.

respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was addressed by the respondents; that by all those means he led, and intended to lead, the respondents to believe, and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well-known and solvent house of Blenkiron & Co., doing business in the same street. My Lords, those things are found as matter of fact, and they are placed beyond the range of dispute and controversy in the case.

If that is so, what is the consequence? It is that Blenkarn, the dishonest man, as I call him, was acting here just in the same way as if he had forged the signature of Blenkiron & Co., the respectable firm, to the applications for goods, and as if, when, in return, the goods were forwarded and letters were sent accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to, and intended for, not himself, but the firm of Blenkiron & Co. Now, my Lords, stating the matter shortly, in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, of him they never thought, with him they never intended to deal. Their minds, never, even for an instant of time, rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required. With the firm of Blenkiron & Co., of course, there was no contract, for as to them the matter was entirely unknown, and therefore the pretense of the contract was a failure."

But why was not the mistake of Lindsay & Co. simply as to the identity of the writer and hence similar to *Edmunds v. Transportation Co.*? It was clearly their intention to contract with the writer of the letter, although they were mistaken as to his identity. The letter was not a forgery,

although intended to deceive. Suppose Blenkarn had called upon Lindsay & Co., stating that he was the firm of Blenkiron & Son; surely a contract would have arisen, because they would have intended to contract with that personality. But if it had happened that Lindsay was locked in his office, consisting of a wooden partition half-way up to the ceiling, with the lock out of order, so that he conversed with Blenkarn over the partition, it could surely make no difference that he failed to see his visitor, but carried on his negotiations by voice separated by an inch of plank. He still intended to contract with the personality with whom he was talking, the body possessing the voice. But suppose that personality had been in an adjoining room fifty feet off, and the conversation had been by telephone; or, further, imagine that both had been skilled telegraphers, and had communicated by operating telegraphic instruments instead of the telephone, the result must be the same. In each case the intent is to communicate with the personality operating the voice, the telephone, the telegraph instrument, or the pen that writes the letter. Lindsay & Co. were mistaken as to the identity of the person who wrote, but they certainly did intend to contract with the writer. It seems that a contract did arise, and that the Court was not justified in its conclusion.¹

When the character of the mistake is such that no contract arises, neither party is bound. Consequently, if either is mistaken as to a material fact, it is clear that he cannot hold the other, even though it would benefit him to keep to the arrangement in spite of his mistake. Thus, A offers to sell B his horse, meaning a red horse. B supposes A's white horse is intended, and replies that he accepts the offer. B discovers his mistake, but concludes that he would like to have the red horse. If A declines to deliver, he is not liable, because there never was a contract, and hence neither was ever bound. There was no mutuality.

¹ Holmes, *Common Law*, pp. 312, 313. But see 16 *Harv. L. Rev.* 381.

Whether a mistake is material depends upon the circumstances of each case. Suppose a sale of goods to arrive "ex S. S. Lusitania." To prevent mistake the purchaser says, "Is she the fast Cunard boat, whose captain has such a fine setter dog?" And the vendor replies, "Yes, that is right." It turns out that the captain owned no dog, and the purchaser had some other captain in mind. He cannot refuse to receive on that account. They both intended the same ship, which was the material point.

But suppose the proposed contract is to sell Surat Cotton to arrive "ex Peerless from Bombay" and there are two vessels named Peerless, one to sail from Bombay in October, the other in December. The vendor intends the December ship, the vendee that sailing in October. In one case it was held that such a mistake prevented a contract from arising.¹

There, however, so far as the character of the ships was concerned, the mistake does not appear to have been material. There seems to have been no peculiarity about them which would have made a difference. But time of delivery in a mercantile transaction is important, and the mistake was upon that point. The offer was to deliver cotton at a time to be reckoned from December, and not October as the acceptance contemplated. The mistake, under the circumstances, being reasonable, no contract arose.

Judge Holmes,² speaking of this case, says:

"It is commonly said that such a contract is void, because of mutual mistake as to the subject matter, and because, therefore, the parties did not consent to the same thing. But this way of putting it seems to be misleading.

"The law has nothing to do with the actual state of the parties' minds. In contracts, as elsewhere, it must go by externals, and judge the parties by their conduct. . . .

"The true ground of the decision was not that each party meant a different thing from the other, as is implied by the explanation which has been mentioned, but that each said

¹ *Raffles v. Wichelhaus*, 2 H. & C. 906.

² *Common Law*, p. 309.

a different thing. The plaintiff offered one thing; the defendant expressed his assent to another."

It does not appear that each said a different thing. Apparently, the offer was something like this: "I offer you Surat Cotton to arrive ex Peerless from Bombay," and the reply "I accept." Nor does it appear that there was anything in the parties' "externals" to indicate the mistake. There was no contract because one party meant one thing, the other something else. It was what the parties meant, not what they said.

A says to B: "I will sell you my horse at a price to be fixed by C." B replies: "I accept." The horse is a farm animal. B supposes it is a carriage horse. It seems that the sole question here is whether B's mistake is reasonable. The language indicates a contract, but the parties differed in intent. If B's mistake was reasonable, he may show his intent; otherwise not.

The law demands actual agreement, pure mental assent, unless there is some ground for estoppel. The language may show absolute agreement, but if there be a reasonable mistake, the mental attitude is to be considered, and may be proved, despite the language.

In order that a contract may arise, the subject matter must be definite, or capable of being made so. Suppose a bilateral contract between A and B for the sale of apples to be selected by C. There are no particular apples designated, but selection by C will render the subject matter certain.

§ 47. IMPOSSIBILITY¹

"Lex non cogit ad impossibilia."

An agreement is unenforceable which, from its nature, is obviously impossible of performance. It is not reasonable

¹ Impossibility and illegality arising after the contract has been formed, and causing a discharge thereof, are treated *infra* in Chap. VI, Discharge of Contract.

to suppose the parties contemplated a contract when each must have known it could not be performed. Such could not have been their intent. This follows only when the performance is objectively impossible, because the same inference cannot be drawn, fairly, when it is subjective. If performance is objectively possible there may be a contract, even although it is impossible for the given promisor.¹ A promise to paint a portrait is objectively possible, but nevertheless it may be subjectively impossible for many persons. If one thus promises, the promisee may reasonably suppose capacity exists. But a promise to touch the sky² is evidently impossible in its nature, as would be a stipulation by the promisor to convey his own property to himself.³ These would be objectively impossible.

The early common law cases were generally favorable to the plaintiff, because the Courts were inclined to take the view that any one who promised an impossibility must abide by his folly.⁴

In any given case the inherent impossibility must be tested "according to the state of knowledge of the day."⁵ Thus a promise by one in New York to speak at once to a person in Chicago, or to fly ten thousand feet high, might have been looked upon as absurd seventy-five years ago, while to-day one may reasonably promise either.

On the other hand, although Darius Green⁶ made a failure of his flying machine, he might reasonably have promised to manufacture such a machine, and others might well suppose

¹ *Beebe v. Johnson*, 19 Wend. 500.

² *Gaius*, Inst. III, § 98.

³ *Idem*, § 99; *Harvey v. Gibbons*, 2 Lev. 161; *The Harriman*, 9 Wall. 161, 172.

⁴ *Thornborow v. Whiteacre*, 2 Ld. Raym. 1164.

⁵ *Clifford v. Watts*, L. R. 5 C. P. 577.

⁶ "And wise he must have been to do more than ever a genius did before." John T. Trowbridge, in "Darius Green and his Flying Machine."

he seriously intended such a promise. It is quite possible for an inventor to see ahead of his time.

In the case of an inherent impossibility, not necessarily apparent, known to the promisor,¹ but not to the promisee, a contract arises. When, however, such impossibility is known to the promisee there is no contract, as he could not have supposed an obligation was intended, or if the promisor was ignorant thereof, the promisee could have had no expectation of its fulfillment, and cannot be supposed to have intended to contract.

Although performance may be impossible as matter of fact, this should not prevent the contract from arising unless the impossibility be known to the parties. Thus in *Hills v. Sughrue*,² there was a promise to load plaintiff's ship with guano, at a certain island. The defense was that there was not enough guano on the island to make a cargo. This was held insufficient, and plaintiff had judgment.

In *Stevens v. Coon*³ there was an application of the doctrine which seems unsound. The Court said:

"The undertaking of the defendant below is 'that plaintiff's tract of land shall sell for a certain sum by a given day.' Is it not legally impossible for him to perform this undertaking? Certainly, no man can in legal contemplation force the sale of another's property by a given day, or by any day as of his own act. . . . If the contract had been that the tract of land would be worth \$200 by a given day, then it could have been recovered on, if it did not rise to, that value in the time."

The contract in this case seems to mean nothing more than that the defendant promises that the plaintiff shall have an opportunity to sell for a certain price at a certain day,

¹ *Millward v. Littlewood*, 5 Ex. 773. In that case the defendant, who was already married, promised plaintiff that he would marry her, she being ignorant of the existing marriage. To the same effect, see *Wild v. Harris*, 7 C. B. 999.

² 15 M. & W. 253.

³ 1 Pinney (Wis.), 356.

which is no more impossible of performance than a promise that the land shall be worth \$200 at such day. In neither case can the promisor literally perform, but he can guarantee the opportunity or the price, and such seems to have been the contract in the above case.¹

*Hall v. Cazenove*² was an action upon a charter party, which contained a covenant that the ship should sail on a certain day. As the instrument was not executed until a day subsequent to that named, the covenant was impossible of performance, and was held by the Court to have become nugatory. It is clear in this case that the parties could not have intended that this covenant should be enforced.

§ 48. UNCONSCIONABLE AGREEMENTS

This class of agreements represents extreme situations, and refusal to enforce them is based upon principles somewhat akin to those underlying the equity doctrine which refuses specific performance of hard or unfair contracts. Thus a promise to pay for a horse a barleycorn for the first nail in his shoe, doubling the amount for each successive nail in the four shoes, would bind one to pay an absurdly large sum.³ So also the promise in *Thornborow v. Whiteacre*⁴ to furnish two grains of rye corn on Monday the 29th of March next, four grains the next following Monday, and so on, doubling every week during the year, was clearly unconscionable, and of such a gross character as to prove that the promisor could have had no conception of what he was promising. Although Lord Holt allowed recovery on the ground that performance was possible, doubtless the plaintiff would fail to-day.

¹ See on this entire topic, Hare on Contract, Chap. VI; Winscheidt, *Pandekten*, §§ 315, 316.

² 4 East, 477.

³ *James v. Morgan*, 1 Lev. 111.

⁴ 2 Ld. Raym. 1164.

§ 49. UNLAWFUL SUBJECT MATTER¹

"Ex turpi causa, actio non oritur."

No one is permitted to contract for that which is unlawful.² The requisite elementary acts may take place, but the law refuses to annex the consequences, and hence no obligation arises.

The subject matter may be prohibited because it is bad or immoral in its nature (*mala per se*), or because it contravenes some general public policy (*mala prohibita*). Thus an agreement to commit crime would be fundamentally in conflict with the civilized criterion of morals, while such would not be the case did the parties contemplate disobeying the usury laws. The latter agreement would violate a general public policy, but there would be nothing immoral in its nature.

The proposed contract may contain various stipulations, some legal and some illegal. If they can be apportioned to different considerations, those which are legal will stand and the remainder fall. If this cannot be done, the entire transaction is void.³ Suppose C, engaged in counterfeiting, employs B to do domestic work at \$20 per month, and to help in the counterfeiting at \$10. This can be apportioned,

¹ The distinction should be noted between contracts which may be set aside for fraud, and agreements which contemplate illegal acts. In the case of fraud a contract arises with all the possible consequences, although a court of equity may set it aside. In the case of proposed illegal acts, the law does not permit the contract to come into existence.

² *Atkins v. Johnson*, 43 Vt. 78; *Spinks v. Davis*, 32 Miss. 152. Cases to this effect may be found in every State in the Union. See Benjamin, *Contract*, p. 87, and cases cited.

³ *Central N. Y. Tel. Co. v. Averill*, 190 N. Y. 128. The Court (at p. 140) quotes with approval a portion of the opinion of Mr. Justice Willes in *Pickering v. Ilfracombe Ry. Co.* (L. R. 3 C. P. 235, 250) as follows: "The general rule is that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." *United States v. Hodson*, 10 Wall. 395; *Leake, Contract* (3d ed.), 677.

and there would be a contract for the domestic work, while the remaining arrangement would be illegal and void. Had the consideration been \$30 for the entire employment, there could be no apportionment, and the entire transaction would be void.

Under the head of illegal agreements are those to commit a crime or a tort, or in contravention of a statute,¹ or those which propose prostitution² or gambling,³ and generally anything prohibited⁴ as being against public policy, which includes marriage brokerage arrangements, and those in discouragement of marriage,⁵ or in restraint of trade.⁶

It does not follow that an act is not illegal because its performance entails no penalty. Its character may be such that no legal right can be based upon it. The law proceeds upon the theory that the tendency of agreements calling for action of that sort is to injure the community at large, and hence that they should not be enforced. A Court must decide whether a given case before it presents an agreement which is *contra bonos mores*.⁷ To that extent the liberty of contract is curtailed.⁸

Whether an agreement is basically immoral, or merely prohibited on some view of public policy, may make a practical difference in many instances. Suppose a contract made

¹ *Materne v. Horwitz*, 101 N. Y. 469; *Graver v. Johnson*, 156 Mass. 211; *Foley v. Spier*, 100 N. Y. 552; *Griffith v. Wells*, 3 Denio, 226.

² *Saxon v. Wood*, 4 Ind. App. 242. Holding that an agreement for illicit cohabitation is tainted with immorality and void. But see *Boigneres v. Boulon*, 54 Cal. 146.

³ *McKinnell v. Robinson*, 3 M. & W. 434.

⁴ *Waugh v. Morris*, L. R. 8 Q. B. 202. The Court said: "A contract to do something which is against the law is void even though the parties were ignorant of the law."

⁵ *Lowe v. Peers*, 4 Burr. 2225; *Chalfant v. Payton*, 91 Ind. 202.

⁶ *Bishop v. Palmer*, 146 Mass. 469; *Sterling v. Sinnickson*, 5 N. J. L. 885.

⁷ *Cowan v. Milbourn*, L. R. 2 Ex. 230; *Anheuser-Busch Brewing Assoc. v. Mason*, 44 Minn. 318.

⁸ The freedom of contract is limited by the law in several directions. See article by the author, "Should there be Freedom of Contract," 4 *Columb. L. Rev.* 423.

pursuant to the law of the place of its origin, and an action brought thereon in a forum where the law forbids the making of such a contract. Should the law of the forum or the place of the contract's origin govern in that respect? The answer depends upon the nature of the agreement. A contract exists because its formation is permitted by the law of the place where the elementary acts were performed, and hence such law would annex the obligation. But the Courts of a foreign jurisdiction will refuse it recognition if it contravene the public policy of its own people.¹ Conceive that the laws of some country should permit contracts calling for murder or plural marriages. Such contracts would not be enforced elsewhere, because according to the views of most civilized peoples they are fundamentally bad. Imagine, however, an agreement not intrinsically immoral, but against the public policy of one state and not of another. There is no sound reason why the Courts of the country where such contracts are not permitted should refuse them recognition when they have arisen elsewhere. No public good is endangered in such a case.

*Forepaugh v. Delaware, Lack. & W. R. R. Co.*² was an action upon a contract made, to be performed, and the breach of which occurred in New York. The contract contained a clause exempting the defendant carrier from loss occasioned by its negligence.³ Such an exemption was valid in New York but not in Pennsylvania. The action was brought in Pennsylvania, to recover damages covered by the exemption clause. The Court sustained the exemption, and refused to allow a recovery. Mitchel, J., said:

"The general rule is that Courts will enforce contracts valid by the law of the place where made, unless they are injurious to the interests of the State or its citizens. The injury may be indirect by offending against justice or morality, or by tending to subvert settled public policy; but

¹ *Higgins v. Cen. New Eng. & West. R. R. Co.*, 155 Mass. 176; *Hope v. Hope*, 8 D. M. & G. 731.

² 128 Pa. St. 217.

³ See *infra*, p. 150.

this does not imply that Courts will not sustain contracts that would not be valid within their jurisdiction, or will not enforce rights that could not be acquired there. Thus, for example, the Courts of Pennsylvania have always enforced contracts for a higher rate of interest than would be valid under the laws of this State. The contract in the present case does not directly affect the state or its citizens in any way. Nor is it in any way contrary to justice or morality."

This is the sound view. But the same cannot be said of an English case¹ where the situation was reversed. In that case the Court sustained a clause exempting the common carrier from liability for damage arising from its own negligence, although such a clause was void by the law of Massachusetts. The contract was made in Boston, and was an agreement to carry cattle from that city to England on a British ship. The Court invoked the absurd doctrine, so much in vogue, that the parties made the contract with reference to the English law which permitted such an exemption. On principle the decision is wrong. The idea that people may contract in disregard of the law of the place where they are located at the time, although much advocated, and often recognized, is not reasonable.

§ 50. (a) Contracts lawful in themselves, but desired by one of the parties as a means to an illegal end

These are cases where the subject matter of a proposed contract is clearly legal and proper, yet the proceeds and results are desired by one of the parties for illegal purposes. Proposed contracts of sale frequently raise such questions.

Either one of the following situations may then exist:

- (1) *The vendor may be ignorant of the proposed illegal use.*
- (2) *The vendor may know of the illegal use to which the article is to be put.*
- (3) *The vendor may aid in the illegal act or purpose to participate in the profits.*

¹ *Re Missouri S. S. Co.*, L. R. 42 C. D. 321.

In the ignorance of the vendor, the intent of the vendee to make an illegal use of the article to be purchased, or subsequent actual use for such purpose, does not prevent an otherwise innocent arrangement from ripening into a contract.¹ This is so when the vendor suspects or even has reason to believe that the illegal action may follow.²

Where one of the parties desires a contract, otherwise lawful, in furtherance of an illegal purpose, opinions differ as to whether knowledge by the innocent party of that circumstance will vitiate the agreement. But where the purpose is to further a crime, such knowledge, according to the general opinion, is fatal to the arrangement.³ Probably the public safety requires this result.⁴

The cases of *Tracy v. Talmage*⁵ and *Hill v. Spear*⁶ held "that mere knowledge by a vendor of the unlawful intent of a vendee will not bar a recovery upon a contract of sale."⁷

The case of *Pierce v. Brooks*⁸ illustrates an extreme view. The action was upon an agreement for the hire of a brougham, with an option of purchase, and an alternate provision for

¹ *Roys v. Johnson*, 7 Gray, 162.

² *Graves v. Johnson*, 156 Mass. 211.

³ A contract in aid of the late Confederacy was held void in *Texas v. White*, 7 Wall. 700, and in *Hannauer v. Doane*, 12 Wall. 342, it was held that entering a contract with knowledge that its ultimate result would be to procure funds in aid of the Confederacy was void, as its purpose was to aid a crime.

⁴ But see *Pellicat v. Angell*, 4 T. R. 466, where it was held that a contract of sale made with knowledge that the vendee bought the goods in order to smuggle them into England was valid. To the same effect was *Holman v. Johnson*, 1 Cowp. 341, in which case Lord Mansfield, writing the opinion, said: "For no country ever takes notice of the revenue laws of another." See comments on these cases by Holmes, J., in *Graves v. Johnson*, 156 Mass. 211.

⁵ 14 N. Y. 162. This case reviews the decisions to that time. See *Hull v. Ruggles*, 56 N. Y. 424.

⁶ 50 N. H. 253.

⁷ *Anheuser-Busch Brewing Assoc. v. Mason*, 44 Minn. 318. Collins, J., speaking of *Tracy v. Talmage* and *Hill v. Spear*, said in his opinion: "These cases now regarded as leading on this side of the Atlantic."

⁸ L. R. 1 Ex. 213. See for review of this case and others an article entitled "Sale of Goods for Unlawful Use" in 22 Albany L. Jour. 405.

return upon certain payments being made. The brougham was returned, and this action was brought for the agreed payments. The plaintiffs were coach makers and the defendant was a prostitute. The jury found "that the carriage was used by the defendant as part of her display, to attract men; and that the plaintiffs knew it was supplied to be used for that purpose."

There was no evidence that the plaintiffs expected to be paid out of the earnings of the illicit trade. The defendant had judgment, which was sustained on appeal. The Court was of opinion that the knowledge of the plaintiffs was fatal.

The case is extreme, and the result seems objectionable. From the legal standpoint there was no good reason why these coach makers should concern themselves about the immorality of the defendant. The agreement was made in the regular course of their business, and there was no participation, directly or indirectly, in the illegal pursuit.

*Graves v. Johnson*¹ was an action for the price of intoxicating liquors sold and delivered to the defendant in Massachusetts, with a view to their being resold in Maine, where such sale was illegal. The Court held (Justice Holmes writing the opinion) that no recovery could be had. The Court was influenced by previous decisions, and also by the fact that to allow a recovery would give recognition to a contract "against a statute passed to carry out fundamental beliefs about right and wrong, shared by a large part of our own citizens."

Certainly, as the Court says, "the accomplice is none the less an accomplice because he is paid for the act." But it seems a far cry from the transaction under discussion to the case of an accomplice. The plaintiff had no concern in the illegal act, and he would have had no cause for complaint if the defendant had changed his mind, and made a legitimate use of his purchase.

In both the brougham and liquor cases the transaction, if illegal, was so *ab initio*. Hence a subsequent change of

¹ 156 Mass. 211.

purpose on the part of the defendant should not, on principle, affect the result.

The view contrary to that enunciated in these two cases, and which prevails generally throughout the United States, seems preferable, and more in accord with reason and justice.

§ 51. (b) Agreements affecting the security or freedom of marriage

The theory of modern civilization bases the welfare of the State upon the safety and happiness of the home. Hence the law favors marriage as an advantage to the community, and the Courts frown upon any arrangement which tends to interfere with the freedom of individuals to contract for or continue this status, or which has a tendency to taint the relationship with pecuniary motives.¹ Thus an agreement to marry upon a divorce being obtained has been held to be illegal,² while a note to be collected and the proceeds to be paid to a woman, provided she lived with her husband as his wife until his death, and which was given to induce her not to institute divorce proceedings, was held valid.³ Contracts for marriage brokerage have a tendency to lower the tone and dignity of marriage, and are therefore held to be illegal.⁴

¹ *Lowe v. Peers*, 4 Burr. 2225, holding that an agreement not to marry any person but the plaintiff was illegal; *Cross v. Cross*, 58 N. H. 373; where the consideration was for the purpose of procuring a collusive divorce which was held unlawful; *Sterling v. Sinnickson*, 5 N. J. L. 885. In *Duval v. Wellman*, 124 N. Y. 156, 160, the Court quoted with approval the following extract from the opinion in *Boynton v. Hubbard*, 7 Mass. 118, viz.: "These considerations are void — because they have a tendency to cause matrimony to be contracted on mistaken principles and without the advice of friends, and they are relieved against as a general mischief for the sake of the public."

² *Noice v. Brown*, 38 N. J. L. 228. On the other hand it was held in *Millward v. Littleward*, 5 Ex. 595, that an action would lie for breach of promise of marriage, although the defendant, unknown to the plaintiff, was already married at the time.

³ *Merrill v. Peasley*, 146 Mass. 460.

⁴ *Johnson v. Hunt*, 81 Ky. 321.

So, also, a contract made in France, and lawful there, which facilitated a divorce, was refused recognition in England as against public policy.¹

§ 52. (c) **Agreements concerning wagers and gambling**

In England at the common law a wager was not unlawful unless it was against public policy because of its object; as, for instance, when made with reference to a prize fight or an election. This has been regulated by statute, and a wager can be no longer the subject matter of a contract.² But it has been held since then "that although gaming and wagering contracts cannot be enforced, they are not illegal."³ Accordingly where a stock broker was employed to buy and sell stock for a speculative account, neither party intending that there should be any delivery, but merely a settlement according to the market price, he was allowed to recover from his employer on a contract indemnifying him against loss.⁴

Throughout the United States⁵ gambling and wagers have been held to be unlawful.⁶ Litigation has arisen over contracts for transactions of a speculative nature on the various exchanges. Such contracts have been questioned as gambling agreements, and hence void.

If the arrangement contemplates an actual delivery of the article in question it would seem to be legitimate, but if there is to be merely a settlement by paying the difference in the market price, on some settlement day, it is illegal and void.⁷

¹ *Hope v. Hope*, 8 D., M. & G. 731.

² *Hampden v. Walsh*, 1 Q. B. D. 189; *Leake*, *Contract* (3d ed.), 649.

³ *Thacher v. Hardy*, 4 Q. B. D. 685, 687.

⁴ *Idem*.

⁵ In New York wagers were not considered illegal until forbidden by statute.

⁶ *Love v. Harvey*, 114 Mass. 80; *Bernard v. Taylor*, 23 Or. 416; *Collamer v. Day*, 2 Vt. 144.

⁷ *Pixley v. Boynton*, 79 Ill. 351; *Beadles v. Leet*, 85 Ky. 230; *Mohr v. Miesen*, 47 Minn. 228.

§ 53. (d) Agreements in restraint of trade

In earlier times¹ it was believed that any contract which limited a person in the pursuit of his trade or calling was detrimental to the public good, as tending to prevent him from earning a living, and thus making it more probable that he might become a burden on the community. This view was soon modified, and the Courts came to recognize the legitimacy of such limitations provided they were reasonable.² Thus an agreement not to carry on a certain trade in all England would have been unreasonable and void, while a limitation restricted to a narrow location, as, for instance, within half a mile, would have been considered reasonable. It was, and is, a simple question of fact whether the restriction is reasonable or not.

As the conveniences of civilization increased, and intercourse became simpler and more general, limitations of trade which would formerly have been held to be void would now be considered reasonable and valid. If proposed contracts are found, as fact, to be an unreasonable restraint of trade, they are still refused recognition by the courts,³ but the rule is now less severely construed.⁴

§ 54. (e) Agreements exempting common carriers from liability for injury or loss occasioned by their own or their agents' negligence

The weight of authority in the United States is against permitting such exemptions. Earlier New York cases⁵ held

¹ Y. B. fol. 5, 2 Hen. V, p. 26.

² *Mitchel v. Reynolds*, 1 P. Wms. 181; *Collins v. Locke*, 4 App. Cas. 674.

³ *Herreshoff v. Bontineau*, 17 R. I. 3; *Emery v. Ohio Candle Co.*, 47 Ohio St. 320; *Bishop v. Palmer*, 146 Mass. 169.

⁴ *Diamond Match Co. v. Roeber*, 106 N. Y. 473. See also *Tode v. Gross*, 127 N. Y. 480; *Mathews v. Associated Press*, 136 N. Y. 333, 340.

⁵ *Cole v. Goodwin*, 19 Wend. 251; *Gould v. Hill*, 2 Hill, 623; *Hollister v. Nowlen*, 19 Wend. 234.

that a common carrier could not, even by express contract, restrict in any way its common law liability, but these cases were modified by later authorities, until the view was reached that a common carrier could, by express contract, limit its liability, even for its own negligence.¹

English,² Federal,³ and State⁴ authorities, however, while now generally maintaining that a common carrier may by special contract, not unreasonable, limit its common-law liability, refuse, for sound reasons, to allow such carrier to restrict its liability for its own negligence. And now by statute,⁵ it would seem that New York must fall in line with the large majority of jurisdictions.

The reason which has led the Courts to this conclusion is well stated by Bradley, J., as follows:⁶

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to stand out and seek redress in the Courts. His business will not admit such a course. . . . If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public, in the line of employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public."

¹ *Dorr v. Steam Nav. Co.*, 4 Sand. 136. In *Meynard v. Railroad Co.*, 71 N. Y. 180, 185, the Court recognized that in New York a common carrier could exempt himself by special contract from responsibility for negligence of himself or his agents, and said: "But the right thus to stipulate has been so repeatedly affirmed by this Court, that the question cannot with propriety be regarded as an open one in this State."

² *Carr v. Lancashire & Yorkshire Ry. Co.*, 7 Ex. 707.

³ *Railroad Co. v. Lockwood*, 17 Wall. 357.

⁴ *McFadden v. Missouri Pac. Ry. Co.*, 92 Mo. 320. See also *Railway Co. v. Wynn*, 88 Tenn. 320, and cases cited.

⁵ Pub. Serv. Com. Law. § 38. The language of this section is taken from the Interstate Commerce Act, § 20.

⁶ *Railroad v. Lockwood*, 17 Wall. 357, 379.

§ 55. (f) Agreements which obstruct the administration of justice, or unduly foster litigation

Any agreement to stifle criminal proceedings, or to retard or obstruct civil proceedings, is void.¹

Champerty and Maintenance² have always been condemned by the law. A bargain "whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action," is champerty by the English law, and "maintenance in its worst aspect" was found in an agreement to supply a litigant with the evidence upon which the suit must depend.³

In the United States the Courts have not adhered strictly to the common-law rule of champerty and maintenance,⁴ although the danger of unscrupulous professional conduct

¹ *Partridge v. Hood*, 120 Mass. 403, and cases cited; *Goodrich v. Tenney*, 144 Ill. 422. But an agreement to facilitate a criminal prosecution is not unlawful. *Nickelson v. Wilson*, 60 N. Y. 362.

² "Common-law barrettry is the offense of frequently exciting and stirring up suits and quarrels between His Majesty's subjects, either at law or otherwise."

"Maintenance is an offense that bears a near relationship to the former, being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it."

"Champerty . . . is a species of maintenance, . . . being a bargain with the plaintiff . . . to divide the land or other matter sued for between them, if they prevail at law: whereupon the champertor is to carry on the party's suit at his own expense." Blackstone, Com., pp. 134, 135.

"Champerty differs from maintenance chiefly in this, that in champerty the compensation to be given for the service rendered is a part of the matter in suit, or some profit growing out of it; while in simple maintenance the question of compensation does not enter into the account." *Bouvier's Law Dictionary*.

³ *Hutley v. Hutley*, L. R. 8 Q. B. 112. Professor Williston in a note (*Cases on Contract*, Vol. II, p. 421, n. 1) cites the case of *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (2 App. Cas. 186) to the effect that the English rule as to champerty and maintenance is not in force in India.

⁴ In *Cartright v. Burns* (13 Fed. Rep. 317), the Court said: "The tendency in the courts of this country is stronger in the direction of relaxing the common-law doctrine concerning champerty and maintenance. . . ."

underlying such practice has always been recognized. But in Massachusetts ¹ it was held that an agreement by an attorney to prosecute suits on behalf of his clients for certain sums of money in which he himself had no previous interest, in consideration of receiving fifty per centum of any recovery and making no charge in case of failure, was champertous. On the other hand the same Court held ² that an agreement whereby an attorney was to be paid all his disbursements, and in case of failure was to receive no fee, but in the event of success was to become entitled to a larger amount than would otherwise be charged, was lawful.

Generally it has been held that if the client is to pay all expenses of litigation, a contingent fee is not champertous. The contract, however, must be reasonable and just.³ In New York an agreement was held ⁴ to be lawful whereby an attorney assumed all costs and expenses of the litigation, indemnifying his client against them and relying upon success for his compensation.

In *Bowman v. Phillips* ⁵ there was an agreement whereby attorneys were to be paid \$80 per month, for which they were to defend all prosecutions against the parties for violations of the prohibitory liquor laws. The agreement was held to be illegal because it tended to encourage a breach of these laws. The Court says that attorneys may contract to defend parties already charged with having committed a crime, and also recognizes the legitimacy of contracts for future services in cases where the acts contemplated are innocent and lawful. One may become civilly liable in such cases and need a defense.

¹ *Ackert v. Barker*, 131 Mass. 436. See to same effect *Thompson v. Reynolds*, 73 Ill. 11; *Gammons v. Johnson*, 76 Minn. 76.

² *Blaisdell v. Ahern*, 144 Mass. 393.

³ *Phillips v. South Park Commissioners*, 119 Ill. 626. And see exhaustive list of citations in *Williston, Cases on Contract*, Vol. II, p. 429, n. 1.

⁴ *Fowler v. Callan*, 102 N. Y. 395.

⁵ 41 Kan. 364. The case seems to be an extreme application of the doctrine.

All agreements tending to obstruct the course of justice or to the detriment of the public service are void; for instance, any arrangement in fraud of creditors,¹ or compounding a felony,² or assigning future salaries, in the case of public officials.³

§ 56. (g) **Agreements contravening Sunday laws** ⁴

Chitty⁵ tells us that the common law prohibited the sitting of courts on Sunday, and says that an Act of Charles I was considered a recognition of the common law on the subject. Kent⁶ agrees with this, and adds that the common law of New York also forbade the doing of some things on Sunday. Gilchrist, J.,⁷ traced the Sunday laws back to the year A. D. 516, when a canon was made forbidding the courts to sit on Sunday. He says that this, and other canons of like nature, were confirmed by William the Conqueror and Henry II, becoming thus part of the common law.

But there seems to have been nothing in the common law prohibiting the making of contracts on Sunday. Now, however, both in England and throughout the United States, statutes limit the right to contract on that day, and any agreement which contravenes the statute of the jurisdiction of its origin is unlawful.

These Sunday laws vary greatly, and the language of any particular statute must be studied, and the authorities construing it examined, before any conclusion can be reached with safety.⁸

¹ *Goodrich v. Tenney*, 144 Ill. 422.

² *Jones v. Rice*, 18 Pick. 440; *Foley v. Spier*, 100 N. Y. 552.

³ *Bliss v. Lawrence*, 58 N. Y. 442. And see generally *Trist v. Child*, 21 Wall. 441.

⁴ See generally Harris, *Sunday Laws*.

⁵ *Contract* (11th Am. ed.), 735-738.

⁶ 3 Com. 277, 278.

⁷ *Allen v. Denning*, 14 N. H. 133.

⁸ In New Jersey, for instance, all business is forbidden, *Reeves v. Butcher*, 2 Vr. 224, while in New York a note or other contract, made

In some States the statute forbids "labor," and it is held that this language does not include contracts, while other statutes using similar language are held to cover them. Where Sunday laws are penal in character, any agreement calling for a contract in conflict therewith is void.¹

The Minnesota Supreme Court held² that an agreement for advertising in a Sunday paper was contrary to the statute, and it was held void, although, subsequent to the making of the agreement, and during its continuation, the law was changed legalizing the publication of a newspaper on Sunday.

In Indiana it was held³ that a statute forbidding "common labor" prevented the making of a note on Sunday, although it bore date the day following. But a subscription made on Sunday for the benefit of a church association was sustained⁴ as an act of charity and not "common labor." The Court says that "the execution of ordinary contracts, and the transactions to which they relate, may well be regarded as acts of 'common labor' within the meaning of the Statute."

In Massachusetts a note bearing date on a subsequent Wednesday was actually made and delivered on Sunday. The Court held⁵ that the plaintiff, who was a *bona fide* holder for value, could recover, although the note was void. The Court looked upon the transaction with the plaintiff as independent of the original note, and hence not tainted with the illegality. It is certainly true that the contract of endorsement was an independent obligation, which bound the endorser, but, as far as the maker was concerned, the plaintiff obtained merely the legal title to a void instrument.

on Sunday and to be performed on a week day, is valid. *Boynton v. Page*, 13 Wend. 425; *Greenbury v. Wilkins*, 9 Abb. Pr., note.

But a contract with a telegraph company to send a message was held void in *Kiley v. W. U. Tel. Co.*, 39 Hun, 158. In Vermont an exchange of horses on Sunday was held unlawful. *Lyon v. Strong*, 6 Vt. 219.

¹ See *ante*, p. 142.

² *Handy v. St. Paul*, 41 Minn. 188.

³ *Reynolds v. Stevenson*, 4 Ind. 619.

⁴ *Bryan v. Watson*, 127 Ind. 42, 44.

⁵ *Cranston v. Goss*, 107 Mass. 439.

The case represents the view very often taken by Courts, but no explanation is forthcoming as to the theory on which they find that purchase for value without notice can produce an obligation where none previously exists. The defense in the main case is real, not personal, and the decision cannot be sustained on principle.

In New Hampshire an action was brought for an injury to the plaintiff's horse. The defendant operated a bridge, half of which was in Maine and half in New Hampshire. The plaintiff paid toll, and then drove his team on to the bridge. While on the portion of the bridge located in Maine, one of the horses was injured through a defect in the structure, due to the negligence of the defendant. The accident occurred on Sunday, and the Maine law rendered pleasure driving on that day unlawful. Had the accident occurred in New Hampshire, the defendant would have been liable, but under the circumstances there was no liability¹ for what would otherwise have been a tort.

¹ *Beacham v. Portsmouth Bridge Co.*, 68 N. H. 382.

The entire subject of Sunday Laws is fully discussed in *Richmond v. Moore*, 107 Ill. 429. It was there held that the Illinois Sunday law does not apply to contracts. That statute prohibits only labor or amusements that disturb the peace and good order of society. It omits "business."

The Court says: "The 29th Car. II, chap. 257, seems to be the basis of the enactments of the various States of the Union." And the Court quotes the statute as follows: "That no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business or work, on the Lord's day." Works of necessity and charity are exempted by this Act.

CHAPTER II¹

CONDITIONS IN CONTRACT

§ 57. *Performance of Contracts*

THIS chapter treats of questions connected with the performance of contracts, and therefore presupposes their existence.

The conclusion that there is a contract merely settles the fact that the parties cannot withdraw, and must abide by the terms of their agreement, whatever they may be. It then becomes necessary to determine whether the promises are absolute or limited.

A limitation may appear from the language of the contract itself, or from surrounding circumstances, or it may not be indicated at all, but be based upon certain rules which the Courts have gradually developed. In the former case they show the intent of the parties and are called express conditions. In the latter they are modifications made by the Courts themselves, and applied as justice requires. They are known as conditions implied in law.

A man may make such lawful promise as he sees fit, and

¹ Portions of the following pages are taken from the author's second edition of his "Cases on Contract," published in 1899, and from the following articles by him: "Should there be Freedom of Contract," 4 Columbia Law Review, 423; and "Conditions in Contract," 14 Yale Law Journal, 424.

The author wishes at this point to make especial acknowledgment to the original work and thought of Professor Langdell upon the subject of conditions as found in his Summary of Contract.

The reader is referred to a very suggestive article in 7 Columb. L. Rev. 151, by Prof. George P. Costigan, Jr., entitled "Conditions in Contract."

is bound to nothing else. He may make a promise which is unconditional, or he may insert any limitations he desires. This necessarily follows because a contract is based upon the consent of the parties.

An express condition affects a promise by rendering the obligation for its performance dependent upon some uncertain event. This may be the happening or non-happening of something specified; the doing or non-doing of some stated act, or, in brief, any event which is lawful and which the promisor desires to embody in his promise. No form of language is requisite, and the same thing may be both a condition attached to one promise, and the subject matter of another.

The occurrence of the event constituting a condition must not lie in the power or will of the promisor, because a promise and its performance must be obligatory upon him.¹

When we are considering express conditions, we are determining what the parties intended by the language they have used. This fact ascertained, we decide what consequences the law annexes thereto. It is a matter of convenience to classify these modifications of a promise as conditions, but in its essence we mean merely what did a certain party promise.

In every instance, the questions as to conditions arise with reference to the promise which is being construed. If an action is brought for the breach of a bilateral contract, we are concerned solely with the conditions in the defendant's promise. For the purpose of that action, we do not look into those modifying the plaintiff's promise. Thus, suppose the condition precedent attached to the defendant's promise is something to be done by the plaintiff, who has promised to do that very thing. Perhaps the plaintiff may have been relieved from performing by the breach of some condition precedent. But this plays no part in considering the defendant's liability. The sole question is whether

¹ See *ante*, p. 93.

the plaintiff has performed the condition precedent to the defendant's promise, and if not, he cannot recover. In other words, while the plaintiff may not be liable if he does not perform, nevertheless he cannot hold the defendant without such performance.

It is generally true that the happening of the uncertain event named as a condition is future. There are cases, however, where this is uncertain to the parties, and yet may have already occurred. It is, as concerns them, to all intents and purpose future, although not actually so. But it has been urged that conditions must depend upon some event future as to the time of the origin of the contract.¹ This is claimed because it is said if the event has happened at the time of contracting, the promise is either absolute or never arises.

In a bilateral contract A and B mutually promised, each that he would do a certain thing upon the condition precedent that the other's college should win in a football game, which the parties supposed to be then going on in another city. It subsequently turned out that the game was finished at that time and B's college defeated. Shall we say, then, that A never made a promise because, in fact, he was never obligated; and, therefore, B is not bound, because there is no consideration for his promise? This reasoning is astute, but its soundness may be questioned.

All future events are objectively certain. If a specified thing happens in the future, it has always been certain that it would do so. The only element of uncertainty is in the minds of the parties contracting. They do not know whether the event will occur or not. But this same uncertainty exists as to the unknown event which has already taken place. Of course, an intended promise which, to the knowledge of the parties, need under no circumstances be performed, is no promise. But it seems sufficient if the parties are uncertain as to the necessity for performance. In other words, the conditioned event is uncertain for the purposes

¹ Langdell, Contract, §§ 28, 89.

of contract if uncertain to the parties. A man limits his promise by a condition precedent because he does not wish to be obliged to perform unless the specified event occurs, and he does not know at the time whether it will occur; but both parties being uncertain, he takes his chances that he may have to perform, and this uncertainty as to his obligation renders it as much a binding promise as is one dependent upon some future unknown event.¹

Where the event constituting a condition precedent has already occurred at the time the parties contract, although unknown to them, there is some difficulty in fixing the time when the obligation to perform arises. Thus A's promise in the case supposed above is made at 5 P. M. subject to the condition precedent that B's college wins the football game. If at 4.30 B's college has won, A is not at once under obligation to perform, because neither party can know whether the event has happened or not. Suppose the game occurred in Europe, before the cables were known, and it took fourteen days to obtain the news, the statute of limitations would not begin to run at the instant the contract was formed, but fourteen days later when the news crossed the ocean. The obligation to perform would arise when the fact was ascertainable by the parties. The same question would be presented in the case of a future event not ascertainable until some time after its occurrence, and it would seem that the same test should be applied.

¹ Holmes, *Common Law*, pp. 304, 305. And see to same effect, Winscheid, *Pandekten* 1, § 87, and n. 2. Harriman also agrees with Holmes, *Contracts* (2d ed.), § 299, and Professor Costigan takes the same position, 7 *Columb. L. Rev.* 151.

Professor Langdell's view has the support of German writers. Thus Puchta defines a condition as follows: "But a true condition must place the existence of that, which is made dependent upon it, among the undetermined events, and this happens only when the event is future; where the event is past or present it has already occurred, although perhaps this may be unknown. For the same reason the event must be uncertain. From all this is formed the following conception of a true condition: It is the stating in advance of a future uncertain event, upon which the will of the actor makes the existence of the juristic act dependent." *Inst.* II, § 204 (translated from the German).

§ 58. CONDITIONS ARE CLASSIFIED AS PRECEDENT,
CONCURRENT, AND SUBSEQUENT

It is believed that a careful analysis will show all conditions in contract to be precedent.

A condition precedent is a provision rendering necessary the occurrence of some event, be it negative or affirmative, before there is any obligation to perform on the part of the person whose promise is thus modified. For example, when A promises to mow B's lawn, provided it does not rain on the day named. Clear weather on that day is the uncertain event named as condition precedent to the promise to mow. Consequently, it is part of the plaintiff's case¹ to allege and establish the happening of the event named because until then there is no breach of promise on the part of the defendant.

Concurrent conditions occur when there are two promises which may be performed simultaneously, and performance or tender of either constitutes a condition precedent to the other. In some instances a readiness and willingness to perform is sufficient. These conditions are confined mostly to bilateral contracts, but may be found in unilateral in the case of covenants at common law. They may be express or implied in law, but are generally of the latter class, and governed by the rules applicable to such conditions. Frequently they are found in contracts for the sale of real property, the delivery of the deed and payment of the purchase money, or tender of either, forming such conditions.²

¹ The burden of establishing the happening of a condition is necessarily upon the plaintiff.

In many jurisdictions it has been provided by statute that in pleading a condition precedent, the plaintiff need not state the facts constituting performance, but may state generally the due performance of all conditions precedent.

If that allegation is controverted he must on the trial establish performance. See for a fair example, N. Y. Code of Civil Procedure, § 533.

² For illustrations of concurrent conditions, see *infra*, p. 93.

A condition subsequent is one which terminates an obligation to perform after the same has arisen.

It is doubtful whether any case of condition subsequent can be found in contract.¹

I. CONDITIONS PRECEDENT

§ 59. EXPRESS CONDITIONS

Express conditions are limitations inserted by the promisor. When Courts disregard such conditions, they are creating and enforcing an obligation to which the defendant never consented.

These conditions are based upon the intent of the parties as found in the contract. It is not necessary that they be stated in the language of conditions, as the intent must be gathered from the entire contract. They have been described by Professor Langdell as follows:

"An express condition, as its name imports, is one of which the evidence must be found in the language of the parties when read in the light of surrounding circumstances."

Sometimes the language is not clear, and then the intent may be discovered from the circumstances.²

Thus, if it can be ascertained from an instrument which party inserted the doubtful language, there is a fairly clear indication as to whether it is intended as a condition or a representation.

If the words are employed by a promisor with reference to the subject matter of his own promise, they indicate a condition. His object would be self-protection, and naturally he would accomplish this by requiring the desired action as a condition.

On the other hand, if the language is used by the promisee, it is not a condition. No reasonable person would wish to limit a promise made to himself.

¹ See *infra*, p. 215.

² See Langdell, *Contract*, § 33.

In unilateral contracts the questionable language naturally imports a condition, as it is necessarily used in the promise, and limits it. Thus, an insurance policy is always a promise by the company, and, to have any effect, the language must be a condition. In marine insurance policies, the so-called warranties" are, in reality, conditions, and so they have always been construed by the Courts.

In bilateral contracts it is often more difficult to determine whether the doubtful language is a condition or a mere representation.

In *Behn v. Burness*,¹ Williams, J., said:

"The question in this case is whether the statement in the charter-party, that the ship is 'now in the port of Amsterdam,' is a 'representation' or a 'warranty,' using the latter word as synonymous with 'condition'; in which sense it has been for many years understood with respect to policies of insurance and charter-parties. . . . The representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question, however, may arise, whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract."

If it was "a substantive part of the contract," was it a condition or promise? It appears to have been a mere representation made by the owner of the ship who would naturally know its location at the time. The Court found a condition precedent, but the argument in the opinion indicates that this view was based upon the doctrine of implied conditions. If the language under consideration constituted a stipulation or promise, then the case would be a correct application of such doctrine. Professor Langdell regards it as a stipulation,² but the language seems rather to indicate a representation, and upon that construction the decision would be wrong. If, however, it can be regarded as a stip-

¹ 3 B. & S. 751, 752.

² Contract, § 33.

ulation, then the rules of conditions implied in law¹ can be applied and the conclusion of the Court would be right.

In *Norrington v. Wright*² the Court says:

"A statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which the term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract."

A review of some of the best-known cases will help to a better understanding of the subject, and the following rules have been formulated as a guide.

§ 60. (a) Rules for Express Conditions *

"As the only foundation of express conditions is the intention of the parties in each case, and as the power of the parties to create them is practically unlimited, they are not susceptible of classification like implied conditions, nor can they be reduced to any definite rules. Still, certain rules may be laid down respecting them, which will be of material service in dealing with them.

1. "Unlike implied conditions, express conditions may exist equally in bilateral contracts and in unilateral contracts; and it is immaterial whether there are also implied conditions in the same contract.

2. "While the subject-matter of an implied condition is always a covenant or promise, the words or clause in which an

¹ See *infra*, p. 202.

² 115 U. S. 188. It is not accurate to say that the aggrieved party "may repudiate the whole contract."

* In 1877 Professor Langdell formulated and printed, for private use by his students, certain rules for both express conditions and conditions implied in law. These rules were not included in the same form in his *Summary of Contract*. The present author, deeming them of great value, obtained special permission from Professor Langdell to reprint such parts of them as might be desired, both for use in the classroom and for publication. Accordingly, with due acknowledgment, he reproduced portions of them in the second edition of his *Cases on Contract*, and again gives them here. See *infra*, p. 202.

express condition is found may or may not constitute also a covenant or promise, according to the intention of the parties.

3. "Whenever it is doubtful whether certain words do or do not constitute an express condition, it is material to inquire whether they constitute a covenant or promise; for if they do not, that will be an argument in favor of their being a condition, it being a cardinal rule of interpretation to give effect in some way to all the words of a contract, if it be possible; and the argument becomes much stronger when a covenantor or promisor would otherwise have no remedy for the equivalent of his covenant or promise."

In *Callonel v. Briggs*¹ it was agreed that the defendant should pay so much money after the bargain, the plaintiff transferring stock. The plaintiff at the same time gave a note to the defendant to transfer the stock, the defendant paying, etc. Holt, C. J., held that these were mutual and concurrent conditions. But he reached the conclusion that either party bringing the action must aver actual performance or a tender and refusal. This carries the requirement further than is now the case, because the tender required in such cases need not be more than conditional. Ordinarily a tender, to be good, must be absolute, as Lord Holt suggests, but in mutual and concurrent conditions, in modern law, an actual tender is not requisite. A conditional tender will be sufficient. Thus, a tender of performance, provided the other party performs simultaneously, will sufficiently meet the condition precedent.

When parol promises are consideration each for the other, they form one contract even though contained in separate writings. It is said that as each writing is complete and distinct by itself, the parties cannot be supposed to have intended to make them dependent upon each other, and further that the writing cannot be varied by parol, and hence no conditions can be implied.²

¹ 1 Salk. 112.

² Langdell, *Contract*, § 118. This argument is based upon the theory that conditions implied in law are formulated upon the supposed intent of the parties.

But when the Courts imply conditions they are not basing them upon the intent of the parties, and if justice requires, why should they not employ any one of their rules, which applies to the particular situation, as readily as though the promises were on one paper. Nor does this necessitate varying the written instrument by parol. Each written promise must be in evidence as consideration for the other. No further evidence is necessary. The conditions which the Courts imply are extrinsic of the contract and of the intent of the parties.

It would seem that mutual and concurrent conditions should be implied as readily in such a case as *Callonel v. Briggs*,¹ as in any other. Upon this theory the case illustrates the fact that express conditions may sometimes be found where otherwise the Courts would imply them.

True, in 1703, when the case was decided, the Courts had not begun to imply conditions, but the result would be the same to-day.

*Raynay v. Alexander*² was an action for the breach of an agreement to deliver wool. The contract was for the sale of 15 out of 17 tod of wool, to be chosen by the plaintiff. In arrest of judgment it was held that the declaration was bad because it did not show that the plaintiff had selected the 15 tod, which was an express condition precedent.

In *Lock v. Wright*³ the plaintiff declared:

"that the defendant by his writing indented agreed with the plaintiff, that he, the defendant, would accept of the plaintiff £500 fourth subscription so soon as the receipts should be delivered out by the company, and would pay for the same £950 on the 5th November next after the date of the writing. Then he avers that the defendant did not pay the money at the day."

¹ 1 Salk. 112.

See also, for case of express mutual and concurrent conditions, *Dunham v. Pettee*, 8 N. Y. 508.

² Yelv. 76.

³ 1 Str. 569.

To this the defendant demurred, and judgment was given in his favor upon the ground that tendering the stock was a condition precedent, as defendant was to "pay for the same." The Court drew a distinction between a mutual covenant and a deed-poll, because in the former case the defendant would have his remedy over, while in the latter, if defendant paid the money, there would be no method of compelling the plaintiff to deliver the stock.

The difficulty lay, as was pointed out by Eyre, J., in the fact that a day was set for the payment of the money, while the time for delivering the stock was undetermined, and might occur before or after the date fixed for payment. On November 5th, when the payment was due, it might well happen that the receipts had not been delivered by the company, in which case their delivery to defendant could not take place before or at the day of payment. This would seem to be an insuperable objection to the conclusion reached by the Court.

*Thomas v. Cadwallader*¹ was an action for the breach of a covenant contained in a lease for years. The lessee covenanted to keep and surrender the leased premises in good repair, the lessor "finding, allowing, and assigning timber sufficient for such reparation during the said term."

The declaration alleged that the lessee had not performed this covenant. Defendant pleaded that the plaintiff did not furnish timber for such repairing. A demurrer to this plea opened the record, and the Court found that the declaration was defective in that it did not state that the timber was furnished, which the Court held to be an express condition precedent.

It was argued that the plea should have alleged a request for the timber by the lessee, as the lessor could not know when it was needed nor how much. If there had been a covenant to supply the timber, and the action had been upon such covenant, it might well have been said that making a request would constitute a condition implied in fact,² as

¹ Willes, 496.

² See *infra*, p. 177.

otherwise the plaintiff could not reasonably ascertain when timber was needed. But here the supplying was a condition, and not a covenant. A condition cannot be modified by another condition.¹

*Shadforth v. Higgin*² was an action upon a charter-party, whereby the defendant agreed to provide a cargo at Jamaica for the ship described "provided she arrives out and ready by the 25th of June."

This was correctly held to be an express condition, and as the ship did not arrive until July 3d no recovery was allowed.

A very similar case was *Glaholm v. Hays*,³ which was also an action upon a charter-party. The vessel was to sail from England "on or before February 4th." The action was for not providing a cargo upon arrival of the ship at the foreign port.

The ship did not sail from England until February 22d. Recovery was not allowed, probably because sailing on the 4th was held to be an express condition precedent.⁴ The Court said:

"Whether a particular clause in a charter-party shall be held to be a condition upon the non-performance of which by the one party the other is at liberty to abandon the contract, and consider it at an end; or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages, must depend upon the intention of the parties to be collected, in each particular case, from the terms of the agreement itself, and from the subject matter to which it relates."

¹ Langdell, Contract (§§ 116, 150), considers this case as one involving mutual covenants and hence concludes that the lessor was entitled to notice. But there is nothing in the language which justifies finding a covenant to supply timber. It seems to be merely a condition. In fact Langdell himself points this out in § 33.

² 3 Camp. 385.

³ 2 M. & G. 257.

⁴ It will be noted that as the conditions concerning time were express in these cases, it was immaterial whether the breach went to the essence or not. See *infra*, p. 189.

In *Work v. Beach*¹ there was an agreement whereby the plaintiff promised to allow an account to stand "until defendant should be able to pay such balance."

The defendant was proved to be in continuous receipt of \$1250 per month, out of which he saved nothing.

The Court held it to be part of the plaintiff's case to show the ability of defendant to pay, and that this had not been done. Upon the facts as found, the decision is sound. Had the defendant been able to pay at any time, this would have met the requirement, and the condition would have been performed, even though subsequently the defendant should have become unable to pay.

In *Globe Mut. Life Ins. Assoc. v. Wagner*² there was an appeal from a judgment against the Association. The action was upon a policy of insurance issued by the defendant Company. In answering certain preliminary questions, the plaintiff had stated that none of his brothers was dead. It seems that unknown to him one brother had died four years before. He signed a statement in which he said, "I hereby declare and warrant that the answers to the above questions are true," and that they formed the basis for the issuance of the policy.

The judgment was sustained on the ground that this was a representation and not a warranty, *i. e.* not a condition. The case is sound, although there has been some conflict, upon the construction of these terms in life insurance policies.

In *Liverpool, London, & Globe Ins. Co. v. Kearney*³ the decision turned upon the construction of a clause in a fire insurance policy, whereby the insured promised to keep a set of books and the last inventory of the business and, when not in use, to lock them in a fireproof safe, or keep them in some place not exposed to fire, on the premises. The clause ended "and in the event of the failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss."

¹ 13 N. Y. Supp. 678.

² 188 Ill. 133.

³ 180 U. S. 183.

There was a neighboring fire at night, and as the conflagration approached the premises, a clerk removed the books from the safe and took them to his home. In the confusion the inventory was either lost, or left in the safe and destroyed. It could not be produced at the trial. The defense was based upon such non-production.

The Court affirmed a judgment against the company, saying, among other things:

"We are of opinion that the failure to produce the books and inventory, referred to in the policy, means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence, or design of the insured."

It may be that policies should be regulated by statute, but in the absence of such regulation the companies ought to be able to make any terms they please. If the person seeking a policy is not satisfied, he need not take it. Here, by means of pretended construction, the contract which the parties had made was deliberately changed in a material point. The case illustrates the fact that modern Courts frequently refuse to enforce express conditions when they are harsh, and are not required by substantial justice. In this case the Court refused to enforce a clear condition, and did so by an interpretation which did violence to the language used.

It is improbable that a condition can be drawn which the Courts will not evade if it involves a clear hardship, and is not essential to work out justice for the defendant.

Perhaps it is wise to refuse the enforcement of express conditions when they are harsh, unfair, and not necessary for the protection of the promisor, but it should be recognized that in such cases the Courts are actually changing the contracts of the parties.¹

¹ See article by the author entitled "Should there be Freedom of Contract," 4 Colum. L. Rev. 423.

§ 61. (b) Promises dependent upon the "satisfaction" of the promisor

There is a class of cases where the promise is made dependent upon the satisfaction of the promisor, and the Court must ascertain the meaning of this phrase in any given instance. This is determined by the subject matter of the contract. Thus, when the satisfaction concerns æsthetic taste, personal convenience, or individual preference, the Courts hold that the promise is dependent upon the personal liking of the promisor, and consequently it is immaterial whether his dissatisfaction is reasonable or not; as where a suit of clothes is to be made to the satisfaction of the promisor. *Brown v. Foster*¹ was a case of this character. The Court refused recovery and said:

"And even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other party to reject them as unsatisfactory."

On the other hand, such expressions as "upon the satisfactory completion of the following system of heating,"² and that payment was to be made when the defendants "were satisfied that the boilers as changed were a success,"³ have been held to mean reasonable satisfaction, and hence subject to the verdict of a jury.⁴

This is a sound position.

A man desires machinery which works properly, and his contract must have that in view. It would be absurd to suppose that he proposes to have poor working machinery in order to satisfy a whim. Its only use is to work well. There is nothing æsthetic or personal involved. The aim must be to have the object fitted for some practical business purpose.

¹ 113 Mass. 136, 139. See *ante*, p. 94.

² *Hawkins v. Graham*, 149 Mass. 284.

³ *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 388.

⁴ *Doll v. Noble*, 116 N. Y. 230. In this case polishing was to be done "to the entire satisfaction of" defendant.

§ 62. (c) Contracts in which the production of a certificate from some third person, such as an architect or engineer, is required as an express condition

When a Court refuses to enforce such conditions, the terms of the contract are arbitrarily changed, and the obligor is held to a promise he never made. Where the certificate of some expert is required, the promisor is willing to obligate himself to perform only upon receiving the assurance of such skilled person. Should the certificate be refused, and the claim made that such refusal is improper or unjust, this, if considered at all, must be passed upon as a question of fact by the jury. In determining such fact the jury must consider whether the work is or is not properly done. As is correctly said by Erle, C. J., in *Clarke v. Watson*:¹

“This is in effect an attempt on the part of the plaintiff to take from the defendants the protection of their surveyor, and to substitute for it the opinion of a jury.”

If the plaintiff did not like the offer he need not have accepted, but having done so he should stand by the contract thus voluntarily made. As was said in *Fuller v. Jackson*:²

“It is of course for the contractor when he enters into a contract of this kind to consider whether he will accept it or not. I have no doubt contractors do accept clauses which to the lawyer look terrific; but they do it as business men, they do it for better or worse, and they think on the whole it is, very unlikely that an architect selected would act unjustly towards them, and they are content to take him as the person whose award is to be final on the subject.”

Accordingly we find, as a general rule, that such conditions are strictly enforced. Thus, in *Worsley v. Wood*³ there was a condition that in case of loss the insured “should procure a certificate under the hands of the minister and

¹ 18 C. B. N. s. 278.

² 3 Ch. 441.

³ 6 T. R. 710.

church wardens and of some reputable householders of the parish." Upon a loss by fire, the insured procured a suitable certificate signed by the householders, but alleged that the minister and church wardens, "without any reasonable or probable cause, wrongfully and unjustly refused, and have ever since refused to sign it." The Court held that the failure to produce was fatal, and refused to allow a recovery. This case was sound, and has been followed in England.

In *Morgan v. Birnie*¹ an action was brought upon a contract providing for a certain building to "be completed to the reasonable satisfaction of A. B. Clayton, or other the architect for the time being" of the defendant. Such architect was to be "sole arbiter in settling such price or allowance, and all disputes." Payment was to be made upon the architect's certificate.

It did not appear that such certificate was given, and recovery was not allowed. The Court said: "I was of opinion at the trial, and am still of opinion, that the production of a certificate from Mr. Clayton was a condition precedent to the bringing this action."

So also in *Clarke v. Watson*² the non-production of a surveyor's certificate was held fatal. It was stated in the declaration that the certificate had been "wrongfully and improperly" withheld. But the Court did not consider this to be sufficient, as the defendant was not in any way connected with such act.

In *Batterbury v. Vyse*³ the contract provided for an architect's certificate, which was not produced. The declaration stated that this was due to the neglect of the architect "in collusion with the defendant and by his procurement." This was admitted by a demurrer, and the Court very properly held that as the nondelivery of the certificate was due to the collusion and procurement of the defendant, there was a waiver, and hence the production was unnecessary.

¹ 9 Bing. 672.

² 18 C. B. N. S. 278, 284.

³ 2 H. & C. 42.

But in *Milner v. Field*,¹ payment of installments for the work was made dependent upon the production of a surveyor's certificate. No certificate was obtained, but evidence was tendered to show that the defendant had appointed his own father as surveyor, and that although the work was properly done, the certificate "was withheld fraudulently and by collusion with the defendant." This evidence was excluded, and the plaintiff was non-suited. The non-suit was sustained, Pollock, C. B., saying:

"Where, by the contract itself, the certificate of a surveyor is made a condition precedent to the right to payment, even if it be withheld by fraud, that is only the subject of a cross action. The non-suit, therefore, was right."

It is submitted that this case is wrong. There seems to be a clear case of waiver involved in the collusion of the defendant.

The English Courts have consistently held that unless there is a waiver the certificate must be produced. This is simply enforcing the contract voluntarily made. It is wise and logical to insist that the parties be held to their obligations, and that the Courts shall not make other arrangements for them. There is much sound sense in the statement of Lord Holt in *Thorpe v. Thorpe*.² "One's bargain is to be performed according as he makes it."

In the United States the Courts have, in general, sustained the view that where a certificate is required as a condition precedent, it must be produced or there can be no recovery.³

Nevertheless a doctrine has made its way which abrogates the necessity for producing the certificate, and leaves the

¹ 5 Ex. 829.

² 12 Mod. 455.

³ *Blacksmith v. Fellows*, 7 N. Y. 401, 414-417; *Smith v. Bradley*, 17 N. Y. 173; *Chicago & Santa Fe R. R. v. Price*, 138 U. S. 185. In this case as the engineer's certificate was made conclusive on both parties, it was held that the defendant company was bound by it. But there was no allegation of fraud or gross mistake, — as was pointed out in the opinion.

entire question to the jury whenever the plaintiff contractor claims substantial performance, and an unreasonable or fraudulent withholding by the appointed supervisor.¹ This idea is carried to an extreme in New York, and such express conditions are treated as though they were conditions implied in law.²

In most States it is held that a fraudulent withholding of the certificate by the architect excuses its non-production, although the defendant had no connection with the fraud.

A characteristic case is that of *Chism v. Schupper*.³ There it was alleged that the architect "willfully and fraudulently" withheld the certificate. On demurrer the declaration was sustained.⁴

In considering this class of cases, it would be well for the Courts to heed the warning given by Follett, C. J., in his dissenting opinion in *Crouch v. Gutmann*,⁵ where he says:

"The tendency, called equitable, of Courts to relieve persons from the performance of engagements deliberately

¹ *Nolan v. Whitney*, 88 N. Y. 648.

² *Van Clief v. Van Vechten*, 130 N. Y. 571.

Even the conservative Langdell says (Contract, § 36): "Such a condition is very harsh, for it not only makes the payment for work done dependent upon an event which has no necessary connection with the merit of the work, but upon an event which is absolutely within the power of the person employed and paid by the party who makes the condition. The Courts should not, therefore, give a condition such a construction, if it can fairly avoid doing so."

But on the other hand Jackson, J., says in *Loud v. Pomona*, 153 U. S. 564: "If the language is clear and unambiguous it must be taken according to its plain meaning as expressive of the intention of the parties, and under settled principles of judicial decision should not be controlled by supposed inconvenience or hardship that may follow such construction."

³ 51 N. J. L. R. 1. See the hysterical opinion in this case.

⁴ The non-production of a certificate was excused upon various grounds, in the following cases which are fairly representative of the law in the United States: *German Am. Ins. Co. v. Norris*, 100 Ky. 29; *Home Fire Ins. Co. v. Hammang*, 44 Neb. 566, 576; *Schmurr v. State Ins. Co.*, 30 Or. 29.

⁵ 134 N. Y. 45, 58.

entered into, and in legal effect to make for litigants new contracts which they never entered into, and which it cannot be supposed they would have ever entered into, has been carried to a length which cannot be justified in reason."

In the United States, as in England, any circumstance amounting to a waiver of the condition does away with the necessity for producing the certificate.

In *N. Y. & N. H. A. Sprinkling Co. v. Andrews*,¹ the water-works contracted for were properly completed, but could not be put in operation because the defendants failed to make suitable arrangements for water. This was held to excuse the non-production of a certificate.

It would seem where disability, death, or discharge by the promisor of the person appointed prevents the obtaining a certificate, another should be named, and a failure to do so amounts to a waiver.²

*Thurnell v. Balbirnie*³ would seem to be a case of waiver, but under the circumstance this could not help the plaintiff. The contract was for the purchase of fixtures at a valuation to be made by two persons appointed by plaintiff and defendant. Plaintiff's appointee was ready to act, but defendant's appointee neglected to do so. He was not prevented by the defendant, but no new appointment was made. As the contract provided how the amount to be paid should be determined, this precluded any other method of ascertaining the price, and hence there could be no recovery. The result would have been the same, if no appointment had been made at all. There was no promise to appoint, so there was no breach in that respect.

¹ 173 N. Y. 25.

² *Fitts v. Reinhart*, 102 Iowa, 311.

In *Bowery Nat'l Bank v. Mayor*, 63 N. Y. 336, the work was properly done, but a certificate refused by the purveyor solely because he was enjoined by a third person. The Court held that this excused plaintiff from producing the certificate, and likened the case to one of physical disability or death.

³ 2 M. & W. 786.

§ 63. (d) Conditions implied in fact

Some contracts are modified by facts or events not mentioned therein. These modifying facts form true conditions, and are based on the intent of the parties, although not found in the language of the contract. They have been called conditions implied in fact.

Shaw, J., in *Cadwell v. Blake*,¹ describes them as follows:

"When, in the order of events, the act to be done by the one party must necessarily be done before the other can be done, it is necessarily a condition precedent, although there be a stipulation for liquidated damages for the breach on each side, and although there be a fixed future time for payment sufficiently distant to have the work done in the meantime. Suppose B agrees to build, at his own shop, a carriage for A, of A's materials; A stipulates seasonably to furnish materials, and to pay B in four months; and each, upon failure, stipulates to pay a sum as liquidated damages. The furnishing or tendering the materials by A is a condition precedent. Without it B cannot perform. He must build it of A's materials. Even building it of his own would not be a performance. B has his shop, his tools and his workmen all ready, but A does not furnish the materials. If A sues B for not building the carriage, it would be a good answer that A himself had not furnished the materials, because, whatever else the contract may contain, this is in its nature a condition precedent."

In *Raynay v. Alexander*² the condition was implied in fact as well as express, because the defendant could not deliver the fifteen out of seventeen tod of wool until the plaintiff had made his selection.

*Raymond v. Minton*³ was an action for breach of articles of apprenticeship in not teaching the apprentice.

The third plea set up as defense that the apprentice would not be taught, and by his own acts hindered and prevented

¹ 6 Gray, 402.

² Yelv. 76. See *supra*, p. 166.

³ L. R. 1 Exch. 244. See *Ellen v. Topp*, 6 Exch. 424.

the teaching. Upon demurrer this plea was held good. The Court seemed to consider willingness to be taught a condition precedent, because without it there could be no performance. In other words the Court found a condition implied in fact.

This view has been criticised¹ because the impossibility was due to the action of a third person, namely, the apprentice, who was not the plaintiff. But is this sound? The father-in-law of the apprentice took the defendant's promise with the understanding that he would furnish an apprentice willing to learn. It does not seem more reasonable to speak of the act of the apprentice as that of a third person, independent of the plaintiff, than it would were it the case of a horse which refused to eat, the defendant having promised to feed him. Not only must the plaintiff furnish a horse, but a horse willing to eat.

The further suggestion of the same author points out the true solution of the case, namely, that the promise was to take reasonable pains to teach, and not a promise to teach at all events.

*Cadwell v. Blake*² was an action for the breach of a contract made between D. & J. Ames and the defendants.

The said D. & J. Ames are stated in said contract to have sold thereby to the defendants machinery and fixtures in their paper mill, and agreed to teach them the art and mystery of manufacturing paper described in certain letters patent. The defendants agreed to pay for said machinery and fixtures \$4000, in four annual payments, with interest. Payment to be made in paper manufactured according to the process mentioned in said letters patent, and also to pay a certain percentage of the profits, for the right to manufacture. Damages for a failure to instruct were liquidated at \$4000. The defense relied upon was that the secret process was not taught, and that there was no assignment of the right to manufacture.

Shaw, C. J., decided in favor of the defendants, on the

¹ Langdell, *Contract*, § 109.

² 6 Gray, 402.

ground that teaching and assigning were conditions precedent implied in fact.

It was contended that as there was a sale of the machinery, and as title passed at once to the defendants, debt would lie for the price. This might be so if there were no arrangements as to the character of the payment. But the contract expressly provides that payment shall be in paper and not in cash. How can the plaintiffs claim cash on the theory of debt, when the agreement thus provided for payment in paper, and the plaintiffs have accepted such promise. It is quite possible to have a debt arise, although there may be a promise also to pay the cash. But this cannot be so when the contract does not contemplate the passing of cash at all.¹ As matter of fact the defendants offered to return the machinery.

An objection to the decision seems to be that there is no allegation in the pleadings, nor any proof, that the process of manufacture was not a matter of general knowledge, readily accessible to the defendants, nor that valid letters patent interfered with defendant's right to make such paper. There is nothing, therefore, beyond mere surmise, upon which to base a condition implied in fact.

*Rae v. Hackett*² was an action in a charter-party. By its terms the defendant was to proceed with his vessel in ballast "to a safe and convenient port near to Cape Town," and there load a cargo which plaintiff was to supply.

The alleged breach was the non-sailing of the vessel. A demurrer by defendant was sustained because the declaration did not allege that the plaintiff had notified the defendant of the port near Cape Town selected by him. As, under the Court's construction, the plaintiff was entitled by the contract to elect the port, it was not possible for the defendant to perform until such election was made, and notice thereof given to him. The Court very properly held that plaintiff's allegation of readiness to appoint a

¹ But see *contra*, Langdell, *Contract*, §§ 41, 113.

² 12 M. & W. 723.

supercargo to go with the ship, who would have indicated the port, did not meet the requirement because the defendant had not agreed to carry a passenger.¹

In *Armitage v. Insole*² the action was for breach of a contract which contained, among other things, a promise by defendant "to give yearly, free to the plaintiff, during the said three years, twenty tons of coal, to be put free on board ship at Cardiff, for the use of the plaintiff." The breach alleged was failure to supply the coal.

The defendant's demurrer was sustained on the ground that there was no allegation that plaintiff had named the ship for the reception of the coal. This was sound because defendant could not perform without such information.

§ 64. (e) When notice is required by implication

An implication by which a notice is required to be given is based upon the intent of the parties, and is a condition implied in fact precisely as in other cases where such conditions are found.

"The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him . . .

"On the other hand, no notice is requisite when a specific act is to be done by a third party named, or even by the obligee himself; as, for example, where the defendant covenants to pay money on the marriage of the obligee with B, or perhaps on the marriage of B alone (for there are some cases to that effect), or to pay such a sum to a certain person or at such a rate as A shall pay to B. In these cases

¹ On these facts a different result might be reached to-day, in view of the use of wireless telegraphy. If the ship was equipped with suitable apparatus, the information might well be given during the voyage.

² 14 Q. B. 728.

there is a particular individual specified, and no option is to be exercised; and the party who, without stipulating for notice, has entered into the obligation to do those acts is bound to do them.”¹

The above quotations give the rule fully. Of course no such question can arise when there is an express stipulation for notice. A very good illustration of notice required by implication is found in the case of a request to the directors of a corporation for an allotment of stock. This is an offer calling for an act, namely allotment. The directors act in private meeting, and there is no contract until the act is performed allotting the stock. The contract arises then, but as the promisor cannot know this his promise to pay is subject to the condition implied in fact that notice be forwarded to him within a reasonable time and in a reasonable way.

*Vyse v. Wakefield*² was an action for breach of a covenant whereby defendant agreed, upon plaintiff's request, to appear at an office or offices for the insurance of lives within London, or the bills of mortality, or before the agent of any such office or offices in the country in which defendant happened to be, and answer such questions as should be required in order that plaintiff might insure defendant's life, if he should so desire. Defendant further covenanted that he would not do anything whereby such policy might be avoided or prejudiced.

Afterwards defendant, at plaintiff's request, appeared at an indicated office in London, and was examined there. Plaintiff thereafter took out a policy in such office. This policy contained a clause to the effect that if the insured went beyond the limits of Europe it should become null and void. The breach alleged was that defendant went to Canada. A demurrer was interposed because the declar-

¹ Lord Abinger, C. B., and Parke, B., in *Vyse v. Wakefield*, 6 M. & W. 442, 451 *et seq.* The first quoted with approval by Metcalf, J., in *Hayden v. Bradley*, 6 Gray, 425.

² 6 M. & W. 442.

ation did not allege notification to defendant that a policy had been taken out, or that, if taken out, it contained any such clause.

The demurrer was sustained on the ground that giving notice was a condition precedent. The case is sound.

This principle applies to covenants by landlords to repair, and other similar covenants in leases. If no leave to enter is reserved, notice should be given, because otherwise there is no reasonable way by which the lessor can acquaint himself with the need for repair. But where leave to enter is reserved in the lease, there is no necessity to give notice, for the fact does not lie peculiarly within the knowledge of the tenant, but is readily ascertainable by the landlord.¹

§ 65. (f) Notice in cases of guaranty

These cases generally arise in unilateral contracts. There has been some confusion because the Courts have failed to distinguish² between acceptance and notice as a condition precedent in the contract itself. Acceptance completes mutual assent, and performing the act furnishes the consideration. These are the elements of contract, and none exists until they occur. But the requirement of notice is found in an already subsisting contract, and affects the question of performance, constituting a condition precedent to the promise. This condition is implied in fact,³ the intent being found from the circumstances which indicate it. If the performance is of such a character as not to be reason-

¹ *Hayden v. Bradley*, 6 Gray, 425; *Makin v. Watkinson*, 6 Exch. 25.

In *Wehrli v. Rehwold*, 107 Ill. 60, it was claimed that notice should have been given, but the Court held that as the time and place of performance were fixed in the contract, defendant should have tendered his services. The facts being as much within defendant's knowledge as plaintiff's, no motive was necessary.

² See *supra*, p. 48.

³ It is believed that the requirement of notice of dishonor in the case of negotiable paper, is based upon the same principle.

ably ascertainable by the promisor, while it is well known to the promisee, the condition is found from that fact.

In *David v. Wells, Fargo & Co.*¹ there was a guaranty under seal to the company, "unconditionally at all times" to protect them for advances which might be made to Gordon & Co. There was a recitation of \$1 consideration paid. Notice of advances was held unnecessary and recovery was allowed. Notice of default was given the day before action brought, and as no loss was shown on account of the delay, the Court held this was sufficient.

The question turns upon whether these cases come fairly within the general rule requiring notice, or whether the promisor ought to make inquiry and ascertain for himself whether the advances have been made. The sounder view would seem to be that notice should be given in this class of cases.²

§ 66. (g) *Sickness or death as an excuse*

When the performance of a contract depends upon the personality of the promisor, it is frequently stated that his continued health or life is a condition precedent to the promise. While this view cannot be said to be incorrect it seems more satisfactory to treat such a situation as an excuse for nonperformance, thus discharging³ the promise. If continued health or life is a condition precedent, the plaintiff should make the allegation of such fact a part of his declaration. But it is looked upon by the Courts as matter of defense to be pleaded by the defendant. It is not a condition subsequent either in form or effect. If it is a condition, it must be precedent and implied in fact.

¹ 104 U. S. 159. But see *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524.

² See discussion in *Hare on Contract*, pp. 326-335. See also the full citation of authorities *pro* and *con* in *Ames, Cases on Suretyship*, notes, pp. 225, 226.

³ See *infra*, "Discharge of Contract," Chap. VI, for a fuller discussion of the topic.

§ 67. (h) An arbitration clause in contract

Sometimes there is a clause in a contract to the effect that any dispute shall be referred to arbitrators and settled by them. The question may then come up as to whether arbitration is a condition precedent to any recovery for a breach of the contract, or whether there is a mere promise to refer, which may be broken without affecting the remainder of the contract.

When such a clause first came before the Courts for construction, they regarded it as an attempt to usurp their jurisdiction. Therefore they held there was a promise only, and as a breach would result in a trial before the Court, they looked upon this as an advantage, and allowed no damages therefor. Thus these proposed arrangements were nullified completely. They are found frequently in copartnership articles, but, construed as a promise, they become practically void.

In more recent cases, however, a different view has been taken, and there is now a decided tendency to hold arbitration in such cases as a condition precedent to any recovery on the contract.

The earlier idea is well brought out in *Roper v. Lendon*.¹ In that case, the sixth plea set up an arbitration clause drawn in the usual form and alleged that there had been no compliance therewith. Campbell, C. J., said:

"The sixth plea is as clearly bad. The agreement to refer, contained in the fifteenth condition, is merely collateral to the agreement to pay. The Courts will not, therefore, treat the agreement to refer as ousting their jurisdiction until there has been a reference."

On the other hand the recent tendency is shown in the case of *Delaware and Hudson Canal Co. v. Penn. Coal Co.*²

¹ 1 E. & E. 825. See also *Miles v. Schmidt*, 168 Mass. 339.

² *President, Managers, and Company of the Delaware and Hudson Canal Co. v. The Pennsylvania Coal Co.*, 50 N. Y. 250, 258, 259, 263.

In that case there was an arbitration clause, compliance with which the referee had held did not constitute a condition precedent. The Court disagreed with this, saying among other things:

"It appears to be well settled by authority that an agreement to refer all matters of difference or dispute that may arise to arbitration, will not oust a court of law or equity of jurisdiction. . . .

"The tendency of the more recent decisions is to narrow rather than enlarge the operation and effect of prior decisions, limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences, without a resort to courts of law; and the rule is essentially modified and qualified. . . .

"When, as here, the agreement is that the covenantor shall pay such sum, and only such sum, as shall be determined by arbitrators, the procuring an award is as clearly a condition precedent to an action, as if the parties had added, 'and no action shall be maintainable until after the award of the arbitrators.'"

This is the correct view,¹ and there is no good reason why an arbitration clause should not be enforced as a condition when the language permits.

In view of the many early decisions, the provision should be carefully drafted in language clearly indicating a condition precedent.

The language of the draftsman may make the construction difficult as a condition. But the parties must have intended to give the words some force, or they would not have inserted them. Hence the Courts should endeavor to give effect to this intention. To do this they should find an express condition precedent.

¹ *Hamilton v. Liverpool, London, & Globe Ins. Co.*, 136 U. S. 242.

In *Scott v. Avery* (5 H. L. C. 811, 847) the Court said: "But surely there can be no principle or policy of the law which prevents parties from entering into such a contract as that no breach shall occur until after a reference has been made to arbitration."

§ 68. CONDITIONS IMPLIED IN LAW

In the development of early English contract law the Courts strictly enforced the contracts which the parties had made. Express conditions alone were known, and hence none could be found unless indicated by the language. Thus, suppose a bilateral contract in which the promise on one side is to deliver a cow, and on the other to pay 50 shillings. It is evident that the 50 shillings is to be given in payment for the cow. As no language is used which can be construed into a condition, the early Courts would have held each promise unconditional, and hence either party could recover against the other without first performing or offering to do so. As there is an absolute promise to pay 50 shillings, it is obviously immaterial whether or not the plaintiff has delivered the cow. He has promised to do so, and is liable to an action if he does not, but, in the meantime, the 50 shillings promise has been broken, and plaintiff is entitled to damages for the breach.¹

But this logical result was harsh and unsatisfactory to the Courts. They were astute to find express conditions indicated by the language of the contract, although such construction was frequently forced and artificial.

Thus in the year 1500 there is a note to a case in the Year Books² by Fineaux, C. J., in which he says:

"If one covenant with me to serve for one year, and I covenant with him to give him £20, if I do not say for said cause, he shall have an action for the £20, although he never serves me; otherwise, if I say he shall have £20 for said cause."

Here the words "for said cause" are construed as an express condition. As the parties indicated by this language that the £20 was to pay for the work, the Court could say

¹ *Nichols v. Raynbred*, 8 Hob. 88.

² *Anon.*, Y. B. 15 Hen. VII, Fol. 10 b, plac. 7.

that doing the work was a condition precedent to the obligation to pay.

In 1701 Lord Holt, in *Thorpe v. Thorpe*,¹ endeavored to work out rules for the construction of express conditions. He maintained that such language as "for said cause," "for said consideration," or "for it" indicated a condition precedent, unless there was something in the contract itself conflicting with such construction. He formulated two rules for guidance in such cases.

"First, if there be a day set for the payment of money, or doing the thing which one promises, agrees or covenants to do for another thing, and that day happens to incur before the time the thing for which the promise, agreement or covenant is made, is to be performed by the tenor of the agreement; there, though the words be "that the party shall pay the money," or "do the thing for such a thing," or "in consideration of such a thing," after the day is past the other shall have an action for the money or other thing, although the thing for which the promise, agreement or covenant was made be not performed; for it would be repugnant there to make it a condition precedent, and therefore they are in that case left to mutual remedies on which, by the express words of the agreement, they have depended.

"Secondly, if there be a day for the payment of the money or doing of other act for another, and that day is to be after the performance of the thing for which the promise, etc., was made, there, if the agreement be to pay the money, or do other thing "for" or "in consideration," or such other words that would make a condition precedent, there such things, for the doing or performing of which the other agrees to pay the money, or do other thing, must be averred to maintain an action."

Although these rules form the basis for some of the modern rules for implied conditions, comparatively little actual result was obtained.

¹ 12 Mod. 455, 461.

During the following seventy years there was little change in the law, and the Courts continued to require some language as the basis for a condition. Thus in *Callonel v. Briggs*,¹ decided in 1703, each party protected himself by a clearly expressed condition, "the plaintiff transferring stock" and "the defendant paying."

In some cases the decision was influenced by the fact that unless a condition could be found, the defendant performing would be without remedy against the plaintiff, the latter having made no covenant, as in *Lock v. Wright*,² decided in 1723.

In 1744 Willes, J., in *Thomas v. Cadwallader*³ expressed his disapproval of the law of conditions as it was then, but he felt himself bound by precedent, saying, "but this has been so often determined otherwise, that it is now too late to alter it in this respect."

Finally in 1773 Lord Mansfield, with more courage and less regard for precedent, in the case of *Kingston v. Preston*,⁴ disregarded the prior decisions,⁵ and enumerated certain principles which became the foundation for our modern conditions implied in law. In 1816 Sir E. V. Williams, in two exhaustive notes attached respectively to the cases of *Pordage v. Cole*⁶ and *Peeters v. Opie*,⁷ reviewed the authorities and summarized the results. These notes have been cited with approval by the Courts from that day to this.

Lord Mansfield undoubtedly changed the law as regards conditions, but in doing so he was in accord with the opinion which had gradually developed.

The previous decisions had been based upon a strict construction of the language, and it was believed that the in-

¹ 1 Salk. 112. See *ante*, p. 165.

² 1 Str. 569. See *ante*, p. 166.

³ Willes, 496. See *ante*, p. 167.

⁴ Cited in *Jones v. Barkley*, Doug. 684, 689.

⁵ See Langdell, *Contract*, §§ 139, 143.

⁶ 1 Wms. Saund. 548.

⁷ 2 Wms. Saund. 349.

tent of the parties could be found from such language alone. This often led to a result which the parties could not have contemplated. It began to be recognized, that the intent might also be found by an interpretation of the entire contract.

Lord Mansfield was influenced by his sense of justice as is shown by his statement in *Kingston v. Preston*:¹

"That in the case before the Court it would be the greatest injustice, if the plaintiff should prevail."

But he plainly indicated by his language that he believed the propositions he laid down were based upon "the evident sense and meaning of the parties."

There is no doubt that this has been the theory of the Courts from that day to this, and it was voicing this view when Lord Chelmsford said in *Roberts v. Brett*:²

"These rules are not proposed for the purpose of absolutely determining the dependence or independence of covenants in all cases, but merely as furnishing a guide to the discovery of the intention of the parties."

But nevertheless conditions implied in law cannot be explained fully upon the theory that the Courts are simply ascertaining the intent of the parties by interpretation, in place of finding it by construction of the language as in express conditions.

The underlying idea of these implied conditions is broader justice, and this is clearly shown from the fact that unless a breach is material, that is, "goes to the essence," the Courts will not imply the condition. But if they were truly endeavoring to follow the "evident sense and meaning of the parties," they could not escape doing so whenever their rules of interpretation indicated a condition.

Nevertheless, the Courts have always expressed themselves as though they were following the evident intent of

¹ Cited in Doug. 689.

² 11 H. L. Cas. 337, 353.

the parties, and often this view is correct. Thus in cases of mutual and concurrent conditions, the result probably sufficiently well indicates the idea of the parties, although they have not so expressed themselves in direct words. It is also fairly reasonable to say that when one promise is by the terms of the contract to be performed first, the parties expected that promise to be performed before the subsequent promise need be.

But it is equally clear that if these conditions are expressions of the intention of the parties ascertained by interpretation, then such intent must be ascertainable when the contract is made, and, once found, cannot be changed by subsequent events. But this position has never been taken by the Courts, and they do not hesitate to disregard this interpreted intent when they find that the application of their rule works hardship. If the breach does not go to the essence, the Courts leave the party to his remedy by way of damages, because that will be adequate.

Again, how can it be said that when one party agrees to do an act which takes time, as for instance to dig a ditch, and the other is to pay the money therefor, the intent must be that the ditch is to be dug first? By what fair interpretation can we say that the laborer must have intended to do the work first and trust the other party?

The truth seems to be that the Courts have supposed they were finding the intent, and, being satisfied, have, in their pursuit of justice and equity, carried their rules beyond any fair interpretation, and implied them when no intent was manifest, and the parties, probably, had overlooked the possibility of the given situation.

Therefore, while some of the rules may very fairly represent the intent of the parties, the Courts, as matter of fact, apply them whenever they believe justice requires, provided only that no contrary intent has been expressly indicated.

They are the creation of the Courts. As the Courts create them, they will not be enforced, if to do so will cause in-

justice.¹ Such conditions are implied to protect the promisor, and limit his promise, but it will be observed that they never enlarge the obligation of a promise.

Should a situation arise where ordinarily a condition precedent would be implied by the Court, the judge must determine first, as a question of fact,² whether under the circumstances of the particular case, justice calls for the application of the rule. Thus, suppose a bilateral contract on the one side to build a wall in a specified manner, and on the other to pay \$150 therefor. As building the wall takes time, its completion, according to specifications, will be a condition precedent, implied in law, to the obligation to pay \$150. But if the wall should be practically finished, yet lacking in some details, the Court, in an action for the price, must first decide whether the lacking details are so important as seriously to affect the object of the contract, or are so slight that they can be compensated readily in damages. If the defects are slight, the breach does not go to the essence; the rule will not be applied, and plaintiff can recover.

The defendant, in his turn, may recover for the breach of contract by the plaintiff, and in such action it is immaterial whether the breach goes to the essence or not. The sole question there would be, has the wall-builder broken his contract in any detail however small. But in an action to recover the price for building, the inquiry as to the seriousness of the breach must be made in order to determine whether

¹ As shown above (p. 189), Lord Mansfield founded these conditions upon equitable considerations.

Langdell (Contract, § 105) bases them upon the intent of the parties, as does Holmes (Common Law, pp. 334, 335).

Keener in 1893 (Quasi-Contract, p. 225) seems to have been the first to publish the evidently sound view that these rules do not depend upon any supposed intent of the parties, but upon the demands of justice. Professor Costigan (7 Columbia L. R., p. 152, n.) states that he borrowed this doctrine from Professor Williston's Lectures. The author took it from Keener.

See also an article by Professor Williston entitled "Dependency of Mutual Promises in the Civil Law," 13 Harv. L. Rev. 80.

² *Poussard v. Spiers*, 1 Q. B. D. 410.

the promise to pay shall, or shall not, be made subject to a condition precedent.

When it is said that "time is of the essence," the phrase is intended to indicate that any act promised for a particular time must be performed promptly, and such prompt performance will be a condition precedent to the promise on the other side.

Thus, in a contract in which the time is stated to be of the essence, if a day is set for the delivery of a deed and the payment of money, the performances are to be mutual and concurrent.¹ Either side, to put the other in default, must tender performance on his part at the time set. Any delay would be fatal.

It is not always necessary to state in the contract that time is of the essence, if the situation is such that both parties must know it to be important.² But when nothing is said, the Courts will find ordinarily that a reasonable

¹ See *infra*, p. 204.

² If a party to a contract desires that some particular part thereof should be strictly performed, he ought to call the attention of the other party to its importance, unless this is necessarily apparent. Thus, suppose the time of performance is deemed material, there should be inserted a clause stating that time is of the essence. If this has not been done, then timely and reasonable notice thereof should be given. In a contract for the purchase and sale of real property, if one side is not ready on the day for closing, the other party may, if he desires, give notice that time is of the essence, and that the title must be passed at some reasonable time named.

In *Parkin v. Thorold*, 16 Beavan, 59, 71, it was held that a notice on October 1st, 1850, for November 5th, 1850, was unreasonable. The Court said: "It is, I consider, the undoubted law of this Court, that although time was not originally an essential part of the contract, still that either party may, by a proper notice, bind the other to complete in a reasonable time to be specified in such notice." See Ames, *Cases on Equity Jurisdiction*, pp. 327-334, and cases cited: *Leake on Contract*, p. 725.

It is sometimes said that time is always of the essence at law, but that a different rule prevails in equity. In England this was changed in 1873 by the Judicature Act and all courts were directed to construe stipulations as to time as the Courts of equity had previously done.

In the United States this result seems to have been reached without statute.

delay is immaterial and can be compensated in damages. A tender at a later date should include an offer to pay damages.

If the contract is of a mercantile character, or dependent upon a rapidly changing market, the Courts will generally hold time to be material.¹

When it is said that these rules have been worked out for the better administration of justice, the question arises,—just how shall it be determined what justice requires in any given case? Some guide for the solution of this question is desirable, and this must be found by a study of the cases and the underlying influences which have led to their determination. Thus, in many bilateral contracts the performance of each of the promises is intended as payment for the other. When this is so, unless a different intent is indicated, it is eminently fair that one side should not be called upon to perform unless a tender of performance is made by the other. Neither need give credit, and equivalency of performance is the basis for determining the requirement of justice. Hence the resultant rule as to mutual and concurrent conditions.²

Where there is no such equivalency ordinarily the rule will not be applied.

Thus in *Christie v. Borelly*³ the promise on one side was a guaranty of the payment of bills of exchange amounting to £162, and on the other a guaranty of the payment of £300. Here were two conditional promises guarantying

¹ In *Norrington v. Wright*, 115 U. S. 188, Justice Gray says: "In the contracts of merchants, time is of the essence."

See authorities cited by Williston, *Cases on Contract*, Vol. II, p. 110, n. 1.

² In *Goodisson v. Nunn*, 4 T. R. 761, Butler, J., says: "The agreement was that the plaintiff should sell his estate, and that the defendant should buy it. In the nature of the thing, therefore, the two acts are to be done together. In *Kingston v. Preston*, Lord Mansfield said: 'The construction contended for is that in spite of his teeth the defendant shall be obliged to give personal credit to the plaintiff; whereas the essence of the agreement was that neither should trust the other personally.'"

³ 29 L. J. C. P. 153.

different amounts. Neither might ever have to be performed, and if the contingency calling for performance should happen in each case, the amounts would be different. It is clear that there was no equivalency of performance here, and as no injustice would be done, this should have prevented the implying of conditions, even if the time for performance had not been uncertain on both sides. It was this latter circumstance which led the Court to the conclusion that no condition could be implied.

While equivalency of performance is unquestionably a ground for implying conditions in many cases, this is not the sole test, and they may be implied where there is none.

Thus, in *Martindale v. Fisher*¹ the plaintiff promised to deliver cloth to defendant absolutely, while the defendant promised to pay £5, 12s., 6d., to plaintiff in case plaintiff's horse should be beaten in a certain horse race. At the time of action brought, plaintiff's horse had been beaten. Verdict was given to plaintiff, and on a motion in arrest of judgment it was urged that the declaration was defective in not averring the delivery of the cloth. But the motion was denied, and plaintiff recovered. This case was decided in 1745, before the doctrine of implied conditions had been introduced, and the Court followed the old decisions.

There was clearly no equivalency of performance, because the promise to deliver the cloth was absolute, while the promise to pay was conditional, and it might well happen that the obligation to perform would never arise. Nevertheless after the contingent event had happened, it would certainly be incumbent upon the plaintiff, in modern times, to aver tender or delivery of the cloth, and recovery would not be allowed if he had broken his own promise in a material point. That plaintiff shall not be in default would seem, then, to be an implied condition precedent to defendant's promise.

Suppose, again, a bilateral contract, whereby A promises to cut hay between June 1st and October 1st, and B promises to pay \$50 on July 15th. By the terms of the contract the

¹ 1 Wills, 88.

hay cutting may be before or after July 15th while the money is payable on July 15th. Ordinarily this would preclude the implication of conditions. The promise to pay the money is clearly independent and absolute. When July 15th arrives the money is payable whether the hay is cut or not, and as the cutting may be earlier or later, *prima facie*, that promise would be unconditional also. But suppose the hay is destroyed prior to July 15th, and before it has been cut, or that the cutting requires peculiar skill, and A, who has been selected on account of such skill, dies without cutting and before July 15th. In neither of these instances would A or his estate be liable, and it would be unjust to make B pay, as he has neither the hay cut, nor a right to recover damages. Again, should A defer the cutting until after July 15th, as he may rightly do, if B does not pay on July 15th he certainly cannot maintain an action against A after October 1st for failure to cut the hay.

Again, suppose a mutual undertaking whereby A promises to raise five hundred soldiers and B to collect ships for them. Here each performance will take time, and as each party may begin when he pleases, neither can be a condition precedent to the other. But should either default, he certainly cannot obtain judgment against the other for defaulting also.

The success of either party should depend upon showing as an implied condition precedent that he is not in default in any material point, nor has failed to perform for any reason not occasioned by the defendant. And this should be so even though the time for plaintiff's performance may not have arrived.¹

In some instances, however, the justice involved in the application of well-settled rules for implied conditions is not so clear.

Thus, suppose a bilateral contract whereby a man is to

¹ See Corrigan, 7 Colum. L. Rev. 164, at the end of his rule 3. But see *contra*, Langdell, Contract, §§ 106, 107. As Langdell did not base his views upon the equitable doctrine of justice as the foundation for the rules of implied conditions, these arguments would not affect his position.

dig a ditch, and to be paid \$25. As digging the ditch takes time, the performance of this act will constitute a condition precedent to the obligation to pay the money. But why must the ditch-digger do his work first and trust the employer, while the employer need not trust the digger? Probably the rule was adopted because in most cases the employer is financially responsible, while the employee is not. Nevertheless, the abstract justice of the rule is not apparent.¹

When the performance of part of a contract causes a debt, the obligation of the other party to continue his performance cannot be dependent by implication upon the payment of such debt, because the debt is something outside and independent of the contract.² But the contract may contain a promise to pay the money for which the debt arises, and the later performance well may be impliedly dependent upon the performance of this promise, and if failure to pay goes to the essence, performance on the other side need not take place.

Thus, suppose a contract for one year's employment at \$1200 per year, payable monthly on the last day of each month. Here the service for one month would cause a debt for the price. Yet the promise to pay is not performed and, as the breach goes to the essence, the employee need not continue to serve.

So a provision in a building contract for part payment as the work progresses, will cause conditions alternately as to the performance and the payments. There will be a debt for each unpaid installment, but the promise to pay will also give rise to a condition.

In *Cadwell v. Blake*³ there was a contract for the transfer of machinery, the value of which was fixed at \$4000. Ordinarily this might have constituted a sale, and a debt for the price. But the contract provided that payment was to be made in paper manufactured by a specific process.

¹ See Holmes, *Common Law*, p. 337. But see Langdell, *Contract*, § 125.

² Langdell, *Contract*, § 128.

³ 6 Gray, 402. See *supra*, p. 178.

Hence there could be no debt for the price of the machinery delivered, as the payment was a promise, the breach of which would constitute an obligation to pay damages.

As these rules of conditions are invoked to work greater justice, it would seem that in any case where their application would work hardship, they should not be employed.

For instance, in *Boone v. Eyre*¹ the estate in question had been conveyed already, and the purchase money paid. If, then, the conveyance had not included the negroes called for by the contract of sale, and it is granted that this is a vital part thereof, how can this be a breach of a condition precedent to the promise to pay the annuity of £160 for which the action is brought? It is not a case of tendering a deed, for the conveyance has already taken place, and the only relief which can justly and reasonably be granted would seem to be an action on the warranty in the deed, if there be one.² The conveyance having taken place, it would be unjust, even if possible, to hold that the existence of negroes on the plantation could constitute a condition precedent to the payment of the annuity promised.

In a contract for the conveyance of real property, if the vendee has paid two-thirds of the purchase price by installments, and is to pay the balance on receiving the deed, it seems harsh to require that he tender the last installment as a condition precedent to receiving the deed. If he fails to pay this last installment he loses the two-thirds already paid. This may occur through no fault of the purchaser. There seems to be no good reason why the Courts should interfere by implying conditions, and thus change the contract in such a way as to work this hardship.

¹ 1 H. Bl. 273, n.

² Langdell, *Contract*, § 111.

Williston, in a note to this case (*Cases on Contract*, Vol. II, p. 24, n. 1), says: "Ashhurst, J., added, according to a statement by Lord Kenyon in *Campbell v. Jones*, 6 T. R. 570, 573, 'there is a difference between executed and executory covenants; here the covenants are executed in part, and the defendant ought not to keep the estate, because the plaintiff has not title to a few negroes.'"

Yet it is the law that mutual and concurrent conditions will be implied as to the payment of the last installment and delivery of the deed.¹

These rules of Court are conceived generally as implying conditions precedent, and it is sometimes said "the plaintiff must allege and prove compliance with the conditions before he can recover."² But as these conditions are imposed only when justice requires, it would seem that this situation, in any given case, must be found before the Courts will apply its rules. In other words, facts must be before the Court from which it may be determined that the breach goes to the essence. This may be sufficiently clear from the nature of the contract. Thus in mutual and concurrent conditions consisting of delivery and payment. In such a case the Court can see from the declaration itself that either a failure to perform or pay would go to the essence, and plaintiff should allege performance, readiness and willingness, or tender, according to the circumstances.

Suppose a case, however, where this does not appear, necessarily. In such event the Court has no facts upon which to base an opinion, and hence there is nothing to enable it to determine whether the breach goes to the essence or not, whether justice requires that its rules should be invoked, even though some one of them might otherwise apply. Then the defendant should allege any facts upon which he may rely as showing this.

Thus in *Boone v. Eyre*³ the action was upon a covenant in a deed which transferred an estate with the negroes upon it. Plaintiff covenanted that he had good title and was

¹ *Kane v. Hood*, 13 Pick. 281.

² *Corrigan*, 7 Colum. L. Rev. 151, at 163.

³ 1 H. Bl. 273, n. a.

In *Boone v. Eyre* there was an express condition, but Lord Mansfield calmly ignored this, and treated the case as though it were one of implied conditions. The modern courts tend to refuse recognition to express conditions unless the language is very clear.

As the property had already been transferred and retained there was no room to imply a condition.

lawfully possessed of the negroes. Defendant put in a plea alleging "that the plaintiff was not at the time of making the deed legally possessed of the negroes on the plantation." On demurrer, Lord Mansfield held the plea bad, saying: "If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." The plea did not state facts showing that the breach went to the essence, and hence there was no ground upon which the Court could base a condition.

In *Duke of St. Albans v. Shore*¹ the covenant was to convey an estate with timber. The plea set forth explicitly that certain specified numbers of trees had been cut, and upon demurrer to this plea the Court held that it was good. The facts stated enabled the Court to determine that the breach went to the essence.

On the other hand in *Morton v. Lamb*² the Court held that the declaration was defective in not alleging tender, or willingness and readiness to pay for corn. Here it sufficiently appeared from the nature of the contract, that the breach went to the essence.

These cases lead to the following conclusions:

1. When the nature of the contract is such that the Court can determine from the necessary allegations in the declaration that a breach of its terms by plaintiff goes to the essence, then plaintiff should allege performance or its equivalent.

2. When it does not appear from the declaration that a breach by plaintiff goes to the essence, the defendant should state in his plea the facts which he claims show this, and if the Court is satisfied the plaintiff must establish performance.

In considering cases of implied conditions the question is often treated as though it were one of rescission of contract, and the discussion is made to revolve about the point whether the defendant had the right to rescind. This is an erroneous conception. There is no rescission in these

¹ 1 H. Bl. 270.

² 7 T. R. 125.

cases, nor can one of the parties rescind. If, in a case where the rules apply, there is a breach by the plaintiff which goes to the essence, there is a condition precedent unperformed, and of course there can be no recovery. Hence the sole question is, does plaintiff's breach go to the essence? But the defendant can certainly hold the plaintiff in damages for his breach, which he could not do if the contract were rescinded. This expression is unfortunate, misleading, and a cause of confusion both for the Courts and the profession.¹

The modern rules for implied conditions have progressed through the following steps:

In 1773 Lord Mansfield expressed himself as follows:²

"There are three kinds of covenants: First, such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff; second, there are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed the other party is not liable to an action on his covenant; third, there is also a third sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready, and offered to perform his part, and the other neglected, or refused to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either was obliged to do the first act. His lordship then proceeded to say that the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, and that however transposed they might be in the deed, their precedence

¹ See opinion of Brewer, J., in *Anvil Mining Co. v. Humble*, 153 U. S. 540, 551. An extract from this opinion is given by Williston, *Cases on Contract*, p. 212, n. 1. *Daley v. People's Building Assoc.*, 178 Mass. 13, 18, cited also by Williston.

² *Kingston v. Preston*, cited in *Doug.* 688.

must depend on the order of time in which the intent of the transaction requires their performance."

Some years later Sargeant Williams published his notes to *Pordage v. Cole*.¹

It will be observed that rules one and two are taken directly from those laid down by Lord Holt in *Thorpe v. Thorpe*.² These rules are as follows:

"1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act is to be performed; an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that, which is the consideration of the money or other act."³

"2. When a day is appointed for payment of money, &c. and the day is to happen after the thing which is the consideration of the money, etc., is to be performed, no action can be maintained for the money, etc., before performance.

"3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration.

"4. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions and performance must be averred.

"5. Where two acts are to be done at the same time, as where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale."

¹ 1 Wms. Saund. 548.

² 12 Mod. 455.

³ For comment on this rule see Langdell, Contract, § 146.

§ 69. (a) Rules for Implied Conditions¹*General Rule**Mutual and Concurrent Conditions*

In a bilateral contract, no contrary intention appearing, when the performance of each of two promises can take place simultaneously, and each performance is payment in whole or in part for the other, these promises are mutually dependent by implication, and the conditions are mutual and concurrent.

In order that either party may put the other in default he must tender performance, or, where tender would be futile or is waived, be ready and willing to perform. Thus, in these cases tender, or readiness and willingness, constitute a condition precedent to the requirement that the other side shall perform. These facts must be alleged and established by the plaintiff.

This rule applies most frequently to contracts for the sale of real and personal property.²

Special Rules³

"1. If the covenant or promise on the one side is to do specific acts which require time for their performance, while

¹ In equity there is not the same reason for implying conditions as in law. The parties can be fully protected by the decree. Where mutual and concurrent conditions would be implied in law, they are unnecessary in equity and hence tender need not be alleged in the bill. See *Rutherford v. Haven*, 11 Iowa, 587, and cases cited in Ames, *Cases on Equity Jurisdiction*, Vol. I, p. 342, n. 3.

In *Rutherford v. Haven*, Wright, J., says: "In equity the Chancellor has full power to protect the vendee, and to make the execution and deposit of the deed with the clerk or other person to be named, a condition precedent to the enforcement of the deed."

² *Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646.

³ These rules, except the latter part of Rules 2 and 3 in brackets, were formulated by the late Professor Langdell, and the author obtained permission from him to republish them. They embody the substance

the covenant or promise on the other side is simply to pay money, the specific act must *prima facie* be fully performed before the money is payable. In other words, the two sides of the contract do not in that case constitute mutual and concurrent conditions, but one side is subject to a condition precedent, while the other side is absolute and unconditional.

"The most common instances of contracts of this description are ordinary contracts for service, building contracts, and charter parties."¹

"2. When, by the express terms of the contract, one side is to be performed before the other, the side which is to be performed first is independent and absolute, while the other side is subject to condition precedent."²

[From which it further follows that where, by the provisions of an entire contract, several acts are to be performed in alternate order by the parties, performance of each alternate act after the first will be both dependent upon the performance of the preceding act, and a condition precedent to all subsequent acts by the other party. An illustration is found in a building contract calling for part payments as the work progresses.³]

"3. If the covenant or promise on the one side is to do specific acts which require time for their performance, while the covenant or promise on the other side is simply to pay money, and the time for the payment of the money is fixed, while the time for performance on the other side is left indefinite, and may be either before or after the money becomes payable, or partly before and partly afterwards, according to circumstances, — both sides of the contract will be deemed independent and absolute."

[Provided, however, that the plaintiff, at the time he brings an action for a breach by defendant, has not broken his own promise in any material point, repudiated the contract,

of Sargeant Williams' rules (*supra*, p. 201), and are based upon the various decisions. This restatement of the rules in clear and concise language is a great aid to a difficult subject. As the author does not agree with all of Professor Langdell's views, some of the original rules have been omitted, and the others renumbered.

¹ A few words are omitted here from Langdell's rule.

² Phillips & Colby Construction Co. v. Seymour, 91 U. S. 646.

³ These words have been added by the author.

nor become unable to perform for any reason. Absence of these facts will constitute an implied condition precedent to recovery.¹]

"4. But when, in an agreement for the sale of real estate, a day is fixed for the payment of the money, and nothing is said as to the time of delivering the deed, the deed will be deliverable by implication when the money is payable; and the effect will be the same as if the same day had been expressly fixed for the payment of the money and the delivery of the deed, and the two sides of the contract will be mutual and concurrent conditions."²

"5. When the covenant or promise on the one side is negative, and is to refrain from doing something perpetually, while the covenant or promise on the other side is to pay money at a day named, as it is impossible that the former should be fully performed before the money is payable, both sides of the contract will be deemed independent and absolute."

"6. When each side of a bilateral contract is put into a separate instrument, each being complete in itself, and neither making any reference to the other, each side will be independent and absolute. In fact, there are in that case two separate and distinct contracts, and it is erroneous to say that the two instruments constitute one bilateral contract; and it seems that parol evidence is not admissible to connect them together."

"7. If, after a breach of an implied condition by one party, the other chooses to go on with the contract as if no breach had happened, he thereby waives the breach as a breach of condition, though he may still sue upon it as a breach of contract."

"8. When a bilateral contract is in writing, and performance by A is in terms made conditional upon performance by B, while B's promise is in terms absolute and unconditional, there is no room for implying a condition in B's promise, the maxim, *expressum facit cessare tacitum*, being applicable. The mutual promises, therefore, do not constitute mutual

¹ These words have been added by the author. See Corrigan, 7 Colum. L. Rev., p. 164.

² Ziehen v. Smith, 148 N. Y. 558.

and concurrent conditions, according to the general rule; but A's promise is subject to an express condition, while B's promise is independent."

§ 70. (b) Entire and Severable Contracts

In any given action for the breach of a contract, it is no defense to allege that the plaintiff has broken another and totally different contract made with the defendant. Thus, in an action on a promise to pay for certain goods brought by A against a woman B, it is no defense to allege that A has broken his promise to marry B. In such a case there is no difficulty.

But several promises may be made at the same time or they may be contained in the same document, and then, it is difficult often to determine whether there is but one contract or whether there are several, separate and independent. Determination of this point becomes important when a question arises as to whether these various promises are subject to implied conditions.

If they are independent, severable contracts, there can be no implied dependency between them, while there may be if they form parts of one entire contract. Frequently this is illustrated by cases where the question arises whether the language indicates an entire contract performable in installment, or severable, independent contracts.

In *Rugg v. Moore*¹ the Court, quoting from a former decision, suggested the following test:

"It is the consideration to be paid, and not the subject or things to be performed, that determines the class to which a contract belongs. Its entirety or separableness depends, not upon the singleness of its subject or the multiplicity of the items composing it, but upon the entireness of the consideration, or its express or implied apportionment to the several items constituting its subject. If the consideration is single the contract is entire, whatever the number or va-

¹ 110 Pa. St. 236.

riety of the items embraced in its subject; but if the consideration is apportioned expressly or impliedly to each of these items the contract is severable."

Withers v. Reynolds.¹ In this case there was a contract for the delivery of straw from October 20th until the following June 24th at the sum of thirty-three shillings per load, to be delivered at the rate of three loads in a fortnight. The said sum per load to be paid for each load of straw delivered.

The straw was regularly delivered until the following January, when the plaintiff, being in arrear for several loads, was called upon for the amount due and tendered payment for all but the last load, saying that he should always keep one load in hand. The defendant objected to this and refused to send any more straw. This action was brought for breach of the contract by the non-delivery of the remaining loads.

The Court held the defendant not liable, on the ground that the contract called for payment on the delivery of each load, and that the refusal to pay for any more hay on delivery relieved the defendant from the obligation to supply further. Patterson, J., added: "If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw."

The contract seems to have been entire, and not severable. Plaintiff's announcement that, in the future, he would not pay upon delivery of each load appears to bring the case within the principle of the so-called "anticipatory breach,"² which would of itself relieve the defendant. Again such an announcement would be a waiver of tender of any future loads. In such a contract the performance on each side in its order would constitute an implied condition precedent to the obligation to perform the next succeeding act by the other. Delivery of each load would

¹ 2 B. & A. 882.

² See *infra*, Chap. VI.

be a condition precedent to the obligation to pay, and payment a condition to the obligation to deliver the next load, and so on.¹

This assumes that the failure to perform on either side would be a breach going to the essence. The remark of Patterson, J., that failure to pay for any one load might not relieve the defendant, seems to suggest the idea that such breach would not necessarily go to the essence.

Langdell,² however, accounts for this remark on his own theory to the effect that whenever the obligation to pay money amounts to a debt, then the following act is independent, because the payment of a debt cannot be by implication a condition precedent to the following obligations in the contract. It does not appear that Judge Patterson had any such principle in mind, and, further, the mere fact that debt will lie for the price, does not do away with the fact that there is also a promise to pay, and that performance of that promise may be an implied condition to the obligation to deliver further.³

As several loads were delivered without payment, there seems to be ground for maintaining that the defendant had waived the condition of payment on delivery.

Kane v. Hood⁴ was an action brought by the vendor for the breach of a contract for the purchase and sale of real property.

Certain land was to be conveyed and the deed delivered "at the completing of the last payment." The purchase price was \$700, of which \$200 was to be paid in ten days, \$250 in twelve months, and \$250 in two years from the date of the contract, with annual interest. The first two installments were paid, and this action was brought for the final amount. Plaintiff did not tender the deed, and this was held to be a fatal defect on the ground that delivery of the deed and payment of the last installment were mutual and concurrent. The promise to pay the first two installments

¹ See rule 2, *ante*, p. 203.

² See *ante*, p. 196.

³ Contract, § 128.

⁴ 13 Pick. 281.

was independent in this respect, and had these installments not been paid an action for them would have been sustained without any tender of the deed.

The decision is sound. It is eminently fair to imply mutual and concurrent conditions as to the deed and last payment, and clearly payment of the prior installments would be a condition precedent to the obligation to deliver the deed. But when all the installments but the last have been paid, the justice of requiring tender of the last installment is not so apparent.¹ This situation did not arise in this case.

*Nat'l M. & T. Co. v. Standard Shoe Mach. Co.*² This was an action upon a contract to manufacture certain portions of a patented machine for which payment was to be made promptly as the bills came in. There was some delay in payment as the work went on, and finally the plaintiff refused to manufacture or deliver further, and brought suit for the cost of unfinished parts and of mouldings.

The Court held that plaintiff could recover, and that the delayed payments by defendant justified the plaintiff in refusing to manufacture further. Prompt payment constituted an implied condition to the obligation of plaintiff to continue manufacturing.³ Justices Holmes and Loring found as fact that the breach did not go to the essence, the sums not paid being small and the delay slight. The majority of the Court determined this fact otherwise, and found that the breach did go to the essence. On this question of fact the minority would seem to have been right under the existing circumstances, but supposing the breach did go to the essence the decision was undoubtedly sound. The defendant was bound by its promise to pay. This promise was subject to the implied condition precedent of manufacture by plaintiff. When defendant failed to perform the material act of paying, this was a breach of the condition to plaintiff's promise, and thus relieved it of any necessity

¹ See *ante*, p. 197.

² 181 Mass. 275.

³ See rule 2, *ante*, p. 203.

for further performance, and also thereby waived the implied condition to defendant's promise, and defendant was liable for the breach.

*Hoare v. Rennie*¹ was an action on an agreement for the sale of bar iron "to be shipped from Sweden in the months of June, July, August, and September next, and in about equal portions each month, at £15 10s. per ton." Equal portions each month would amount to about 160 tons per month. Plaintiffs began shipping in June, but sent 21 tons only. The defendants refused either to receive this iron or to take the remainder. The Court held the defendants were justified in their refusal. The decision is sound.

Time was of the essence, as this was a mercantile contract, and shipping the agreed portion per month was requisite and material. As plaintiff was to perform the first part, namely, shipping 160 tons in June, this constituted an implied condition² to defendant's obligation to receive and pay. The breach clearly went to the essence.

Pollock, C. B., made the rather singular remark: "It does not turn upon any question of condition precedent." If this was so, it is difficult to perceive what question was involved. In reality the Court made the entire question turn upon the application of the rules of implied conditions, although this is not directly stated. That the contract was entire and not severable admits of no doubt.

In *Jonassohn v. Young*³ there was a contract for the purchase of as much coal from defendant as one steam vessel could fetch in nine months between Sunderland and London. The defendant agreed to pay 5s. 9d. per ton at the beginning of each month.

After the first delivery the defendant refused to accept any more coal, setting up in his pleas that the coal delivered was of inferior quality and that his ship was unreasonably detained. On demurrer to these pleas the Court sustained the plaintiff and he had judgment. The ground of the

¹ 5 H. & N. 19, 26.

² See rule 2, *ante*, p. 203.

³ 4 B. & S. 296.

decision was that it did not appear that the breach went to the essence.

This is clearly an entire contract. Prompt delivery each month of coal of the specified quality was an implied condition precedent to payment at the beginning of each succeeding month.¹ So also payment at the times stated would be a condition precedent to the obligation to continue the supply of coal.

It was incumbent upon the defendant to state facts in his plea showing that the breach went to the essence, as this could not appear from the contract itself. Unless this is made apparent to the Court, there is nothing upon which to base an implied condition. As the Court points out, it would be consistent with these pleas to show that one bucket of inferior coal was supplied, or that the ship was detained one hour. The decision is sound, and similar in principle to the position taken by Lord Mansfield in *Boone v. Eyre*.² Continuing to send the ship after the detention was known to defendant, as stated in the fourth plea, would seem to show a waiver. As no excuse or reason is given for the failure to return the inferior coal, this also would seem to be a waiver.³

*Simpson v. Crippin*⁴ was an action for the breach of a contract to supply "from 6000 to 8000 tons of coal, to be delivered in equal monthly installments during the period of twelve months from July 1st, 1871," at 5*s.* 6*d.* per ton, payable monthly. The coal to be delivered to plaintiff's wagons at defendant's collieries. Plaintiffs promised to take the coal to the same amount and on the same terms. During July the plaintiffs took only 158 tons, and the defendants refused to supply any more. The Court sustained a verdict for the plaintiffs, holding that the breach did not go to the essence, and could be compensated in damages.

¹ See rule 2, *ante*, p. 203.

² 1 H. Bl. 273, n.; *ante*, p. 198.

³ See rule 7, *ante*, p. 204, and Langdell, Contract, § 177.

⁴ 8 Q. B. 14.

This case is in conflict with *Hoare v. Rennie*,¹ and is wrong on principle.

The first act was to be performed by the plaintiff, by sending sufficient wagons during July to take the proper amount of coal as he had promised. Hence sending the wagons would be an implied condition precedent to the obligation to supply the coal. The next step was for defendant to furnish the coal, and doing this, as the wagons called, would constitute a condition precedent to the obligation to pay and to take for the first month. Thus, each alternate act would constitute a condition precedent to the promise to perform the next act in order on the other side.²

The promise to supply the coal would also be subject to a condition implied in fact, namely, arrival of plaintiff's wagons, because, unless these wagons were sent, the defendant could not perform.³ A failure to send the wagons would also be a waiver of the condition which supplying coal would otherwise constitute to plaintiff's promise to pay and to continue taking. Any interference by a promisor with the performance of a condition by the promisee, waives such condition.

Freeth v. Burr.⁴ The contract in this case was for the purchase of 250 tons of pig iron at 56s. per ton. "Half to be delivered in two weeks, remainder in four weeks. Payment net cash 14 days after delivery of each parcel."

The delivery of the first 125 tons was delayed by mutual consent, and the last delivery did not take place until some months after the contract date. The plaintiff refused to pay for the 125 tons delivered, claiming that they could offset this against any damage they might sustain should defendant fail to deliver the second 125 tons. Ultimately the plaintiffs, after action brought, paid for the first 125 tons and brought this action for defendant's refusal to deliver the remaining 125 tons. The defendant claimed that the failure of plaintiff to pay for the first lot absolved

¹ 5 H. & N. 19; *supra*, p. 209.

² See rule 2, *supra*, p. 203.

³ See *supra*, p. 177.

⁴ L. R. 9 C. P. 208.

him from the obligation to deliver the second. The Court sustained a verdict for the plaintiff on the ground that the facts did not show any intention on the part of the plaintiff to abandon the contract, that is to say that there was not a so-called anticipatory breach.¹

The contract appears to be entire. But its terms preclude the implication of a condition precedent, because payment was to be made fourteen days after delivery of each lot, and as the second lot was deliverable four weeks after the date of the contract, payment of the first lot could not be precedent to, although it might be concurrent with, delivery of the second.

Although this was true at the time the contract was made, it is a serious question whether the delays, to which both assented, did not change the situation. At the time the second installment was due the plaintiff was clearly in default as to payment, in fact only paid when forced thereto by action, and hence he should not have been allowed to recover.²

The contract does not appear to be severable. The number of tons is fixed at a total amount, and it is impossible to say that the price was not settled with reference to the wholesale order.

Clearly there was no repudiation of the contract by the plaintiff.

*Mersey Steel & Iron Co. v. Naylor.*³ In this case there was a contract for the purchase from the plaintiff company of "5000 tons of steel of its make to be delivered 1000 tons monthly commencing January, 1881, payment within three days after receipt of shipping documents." In January, a part only of that month's installment was delivered, and in the beginning of February a further portion. On February 2, shortly before payment for these deliveries fell due, a petition was presented to wind up the company. The defendant, under advice of counsel, objected to making

¹ See *infra*, Chap. VI.

² See end of rule 3, *ante*, p. 203.

³ L. R. 9 App. Cas. 434.

payment without leave of Court, supposing that they could not do so safely. A liquidator of the plaintiff company was appointed, and brought action in the name of the company for the price of the steel already delivered. The defendant counterclaimed for damages for non-delivery, and the referee found that such damages exceeded plaintiff's claim, and gave defendant judgment for such excess.

This judgment was sustained. The Court found this to be one entire contract; that defendant had done nothing which reasonably could be called a repudiation, and that the failure to pay under the circumstances did not go to the essence. The case was correctly decided. The contract was entire, and hence performance of each act in its order was an implied condition to the obligation to perform the alternate act on the other side.¹ The first act was to be delivery of steel in January. This was not entirely performed. It was not necessary to determine whether this breach went to the essence, because as a condition it was waived by defendant.² The next step was payment, and this would be a condition precedent to the obligation to make future deliveries. The Court found, as a fact, that this breach did not go to the essence under the circumstances of this case. The contract not being repudiated, the principle of an anticipatory breach as applied in *Withers v. Reynolds*,³ had no place here.

Norrington v. Wright.⁴ This action was brought for the breach of a contract of sale to the defendants of 5000 tons of rails for shipment from a European port or ports, at the rate of about 1000 tons per month, beginning February, 1880, at \$45 per ton, ex ship Philadelphia. Payment to be made on presentation of bills with custom house certificate of weight. Defendant to be notified of names of ships as soon as known.

The plaintiff shipped about 400 tons in February, 885 tons in March, 1571 tons in April, 850 tons in May, 1000

¹ Rule 2, *supra*, p. 203.

² 2 B. & A. 882.

³ Rule 7, *supra*, p. 204.

⁴ 115 U. S. 188.

tons in June, and 300 tons in July. The defendants received and paid for the February shipment on its arrival in March and gave directions for discharge of March shipment. But on May 14th, being for the first time informed of the amounts actually shipped, declined to receive any more. The Court reviewed the leading authorities upon installment contracts, held time to be of the essence in mercantile transactions,¹ and decided in favor of defendants.

The case is sound. Shipment of about 1000 tons in February was a condition precedent to the obligation of defendants to receive the rails and pay for them.² If the defendants had known at the time they received the 400 tons that no more had been shipped in February, receiving and paying for them would have been a waiver.³ As they had no knowledge of this fact nor means of ascertaining it, the act of receiving did not have such effect. The discrepancy between 400 and 1000 was sufficiently grave to go to the essence.

The Court says the failure of plaintiff to fulfill the contract "in respect to these first two installments, justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission."

It is not clear what the Court meant by this. There was no question of rescission, and defendants had no such right.⁴ Their defense was the non-performance of a condition precedent, the breach going to the essence. No principle called for any assertion of right by defendant, whether reasonable

¹ See authorities cited by Williston, *Cases on Contract*, p. 110, n. 1, and also upon the main case, p. 117, n. 1.

² See rule 2, *supra*, p. 203.

³ See rule 7, *supra*, p. 204.

But the defendants neither offered to return the 400 tons nor showed any reason why they could not. This would seem to be a waiver. See *Cohen v. Platt*, 69 N. Y. 348; *infra*, p. 220.

⁴ In *Anvil Mining Co. v. Humble*, 153 U. S. 540, 551, Brewer, J., says: "Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about."

Extract taken from Williston, *Cases on Contract*, p. 212, n. 1.

or otherwise. Of course they should not do any act amounting to a waiver, but no affirmative action was called for by them. It was only necessary for them to refuse to receive, and defend on the ground of the non-performance of a condition.

II. CONDITIONS SUBSEQUENT¹

§ 71. Subsequent in form, precedent in effect

A condition subsequent is one which terminates an obligation after the same has arisen. The happening of the event named must be alleged and proved by the defendant. The obligation has arisen, and the defendant, therefore, commits a breach by not performing unless he can show that his obligation has ceased. It is believed that no instance of a true condition subsequent can be found in contract. As they are conditions in a subsisting contract, it is not possible that its origin can be dependent upon them. Such a condition must modify the performance of the obligation, because otherwise it can have no force. Take, for example, an obligation to pay money six months from date. There will be no necessity for paying until the six months have expired, and no breach up to such date. Suppose, however, that the obligation itself is stated therein to terminate upon the happening of some event during such six months. Should such event occur, the obligation will cease, although it is not yet broken, and the time has not arrived for performance.

But the sole effect of this is to render performance unnecessary. In other words the nonhappening of the event is a condition precedent to the obligation to pay. An obligation has no force except as regards performance, and hence its annulment is ineffective except as to such performance.

The language of a condition can always be thrown into a negative or affirmative form, but this cannot change its nature.

¹ See *infra*, under title "Discharge of Contract," p. 268.

Such conditions are not unusual in transfers of property. In contracts, however, examples are often given which are really conditions precedent.

Thus, in *Elliott v. Blake*,¹ a covenant to deliver saltpetre was subject to a condition which read, "provided that if any mischance happen by fire or water to disable him, that he should be excused." The saltpetre was burned before the expiration of the period for performance. The Court treated this as a condition subsequent, but it was clearly precedent. The defendant had until a fixed day to deliver, and his only obligation was to perform before such day. Hence at the time of the fire the obligation to perform had not arisen. So in *Storer v. Gordon*² the liability to deliver did not arise until the completion of the voyage, and hence the clause exempting the carrier from liability in the event of loss from the perils enumerated would be precedent, because the happening of the event would prevent the obligation to perform by delivery from arising.

Practically speaking, the conditions found in contracts are all precedent. The language used will frequently seem to indicate conditions subsequent, but a careful analysis will show them to be precedent. Such conditions are often called subsequent in form but precedent in effect. It has been suggested³ that the parties by using this form have shown an intention to change the burden of establishing the happening of the event from the plaintiff to the defendant, and many cases are thus explained. It is a question, however, whether by consent the parties can shift the burden of estab-

¹ 1 Lev. 88.

² 3 M. & S. 308.

³ Langdell, *Contract*, § 44.

Costigan, *Conditions in Contract*, 7 *Columb. L. Rev.* 155.

Langdell's language is "the burden of alleging and proving." This seems to indicate the burden of establishing. Costigan considers that conditions subsequent in form indicate an intent to shift the burden of going forward with evidence and not of establishing.

It seems likely that the Courts will treat these conditions which are subsequent in form as placing a burden upon the defendant, and probably the burden will be that of establishing rather than limited to merely going forward with evidence.

lishing, and, even if they have that right, whether it is not pure fiction to assume that they have intended to do so. As matter of fact, it is not probable that the parties give the least thought to the question as to which one shall establish the happening of the event, and furthermore, the Courts in their opinions have not indicated that they were deciding upon any such theory. They seem to have regarded these conditions as subsequent and to have gone no further.

It is usual for insurance companies to insert a clause in their policies to the effect that an action shall be brought thereon within one year after a failure to pay as provided in the policy. These provisions are frequently spoken of as conditions subsequent. As they take effect only after breach of the contract, they cannot be conditions therein. Mr. Justice Holmes¹ speaks of them thus: "The condition does not come into play until a loss has occurred, and the duty to pay has been neglected, and a cause of action has arisen. Nevertheless, it is precedent to the plaintiff's cause of action." But does not an obligation to pay arise as soon as there is a loss and the requisite formalities have been complied with? In other words, the insurance company should pay at once, and if they neglect so to do, and the case goes to trial, they will be defeated, with costs. But this obligation which has arisen, and is payable under penalty of a litigation and costs, continues one year, and then ceases. Bringing the action within one year cannot be said to be precedent to the arising of this obligation to pay, because, if so, then you must first bring your timely action before the obligation arises, and, of course, must fail in that action, because the cause of action had not arisen, but clearly this is not so. The insured would recover in such an action because the obligation has arisen. They do not seem to be conditions, but merely limitations attached to the procedure.

*Cage v. Acton*² was an action for debt for rent against the defendant as administratrix of her husband. The plea of the defendant set up that the intestate in consideration of

¹ Common Law, p. 317.

² 1 Ld. Raym. 515.

marriage with the defendant gave her a bond for £2000 to be paid on demand, upon condition that if the intestate should leave the defendant £1000 or his legal representatives should pay defendant £1000 within a stated time, then the bond should become void. The marriage took place, and the intestate did not leave £1000 to defendant nor was the same paid to her. She thereupon took out letters of administration, and had collected only £250 which she retained in part satisfaction of her debt. A demurrer to this plea was overruled. The decision turned upon the question whether or not the bond was due at once, and therefore extinguished by the marriage. On its face the bond was payable immediately, but such a construction would leave the proviso without effect, whereas it was the evident intent of the parties that nothing should become payable thereon, unless the negative proviso should happen. In other words, the intent was clear to make the non-doing of these acts a condition precedent to the obligation to pay. The Court so held, Holt, C. J., dissenting.

The defense was affirmative, and the defendant by her plea undertook the burden of establishing the negative condition, which would show that the pleader looked upon it as precedent.

Gray v. Gardner¹ is a case often cited as one involving a condition subsequent, but while the condition is such in form, it is precedent in effect.² Nevertheless the Court held that the condition must be pleaded and established by the defendant. The case was brought upon a written instrument for a sum of money with the following condition annexed, viz: "on the condition that if a greater quantity of sperm oil should arrive in whaling vessels at Nantucket and New Bedford, on or between the first day of April and the first day of October of the present year, both inclusive, than arrived at said places in whaling vessels on or within the same date of time the last year, then this obligation to be void. Dated April 14, 1819."

¹ 17 Mass. 187.

² Langdell, Contract, § 44.

The consideration of the promise was a quantity of oil sold by the plaintiff to the defendants. On the same day another note, unconditional, had been given by the defendants for the value of the oil, estimated at sixty cents per gallon. The note in suit was given to secure the residue of the price, estimated at eighty-five cents, to depend upon the contingency mentioned in the said condition.

At the trial before the Chief Justice, the case depended upon the question whether a certain vessel, called the "Lady Adams," with a cargo of oil, arrived at Nantucket on the first day of October, 1819, about which fact the evidence was contradictory. The judge ruled that the burden of proving the arrival within the time was on the defendants.

The Supreme Court said:

"The very words of the contract show that there was a promise to pay, which was to be defeated upon the happening of an event, viz: the arrival of a certain quantity of oil, at specified places, in a given time. It is like a bond with a condition: If the obligor would avoid the bond, he must show performance of the condition. The defendants, in this case, promise to pay a certain sum of money, on condition that the promise shall be void on the happening of the event. It is plain that the burden is upon them; and if they fail to show that the event has happened, the promise remains good."

This was clearly an instance of condition precedent. The money was not payable unless a certain event, namely the non-arrival of a certain quantity of oil, should occur. As this negative event must happen before the payment is due, such happening is evidently precedent to the obligation to perform. If the case is to be sustained, it must be upon Professor Langdell's suggestion that the form of the condition puts the burden of establishing upon the defendant. This would not change the character of the condition.

Moody v. Insurance Co.¹ was an action upon an insurance Policy. The policy contained a clause to the effect that

¹ 52 Ohio St. 12.

"no liability shall exist under this policy for loss or damage in or on vacant or unoccupied buildings, unless consent for such vacancy or non-occupancy be endorsed hereon."

The trial court held that the burden of proving occupancy of the building was upon the plaintiff. This was reversed on the ground that the condition was inserted for the benefit of the defendant, and that the company must plead and prove the vacancy, as it was not a condition precedent.

All conditions involved in any litigation are for the benefit of the defendant, or what is the same thing for the benefit of the plaintiff in the case of a counter-claim. In other words, conditions material to any case are never in favor of the actor. It would be absurd for him to limit a promise in his own favor. It is evident that the liability of the insurance company is dependent upon the occupancy of the building, and the condition is as clearly precedent as in any case.

Logically, the Courts should have held, in all cases of this character, that the plaintiff must plead and establish the happening of the event, whether negative or affirmative, but, according to authority, this burden, in the case of conditions subsequent in form but precedent in effect, falls upon the defendant.

III. WAIVER OF CONDITIONS

§ 72. Effect of waiver

As a condition to a promise is inserted by the promisor for his own protection, there is no good reason why he may not give up such condition, and this he may do by express words or by conduct indicating such an intent.

A waiver applies both to express¹ conditions and to those

¹ The case of waiver of an express condition approaches closely to that of the giving up of a right to performance. The Courts have never applied the doctrine of consideration to waiver, and rightly, but it is difficult to find any substantial difference between waiver of a con-

implied by law. The intent to waive is frequently found in cases where the contract is to be performed alternately, as, for example, in a building contract. If the one who is protected by a condition goes on performing after a breach thereof, this would constitute a waiver. Also, any notification in advance that a promisor does not intend to perform, unless withdrawn before it is acted upon by the other party, amounts to a waiver.¹

*Thompson v. Noel*² was a case involving a covenant on one side to take a ship to a certain port and there receive and transport two hundred and eighty men, and on the other side to pay £5 per man therefor. Only one hundred and eighty men were carried. This action was for the price of the men transported, and the plea stated that the defendant had tendered two hundred and eighty men, but the plaintiff would not receive them. Nothing was said about the men carried. Upon demurrer the plaintiff had judgment. The case was correctly decided. The condition precedent that the plaintiff should carry the full quota of men before receiving pay, was waived by permitting him to carry a portion only. This case illustrates a waiver of a condition implied in law. The action of *Jones v. Barkley*³ was brought on account of the non-performance of an agreement.

The contract was on the one side for the assignment of the equity of redemption of certain bank stock with a general release and on the other for the payment of money. The breach alleged was the non-payment of the money by the defendant. The declaration alleged tender of a draft of an assignment and release for approval, and offer to execute the same and that defendant "absolutely discharged" the plaintiff from executing the same or any assignment or release whatever. The defendant pleaded

dition and giving up the right to demand performance. No promise is necessarily involved nor plays any necessary part. Compare *infra*, Chap. VI.

¹ See Anticipatory Breach, *infra*, Chap. VI.

² 1 Lev. 16.

³ Doug. 684.

the non-execution tender or delivery of the assignment and release. A demurrer to this plea was sustained.

Lord Mansfield said:

“If ever there was a clear case, I think the present is. . . . The defendant pleads that the plaintiffs did not actually execute an assignment and release, and the question is, whether there was a sufficient performance. Take it on the reason of the thing. The party must show he was ready; but if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act.”

In this case the assignment and release were not to be given to the defendant but to a third person designated by him. It is claimed¹ that on this account the conditions cannot be mutual and concurrent. This does not seem to be so necessarily. There is nothing to prevent the concurrent performance as the three persons can be together at the time of delivery.

¹ Langdell, Contract, §§ 133, 173.

CHAPTER III

RIGHTS OF THIRD PERSONS NOT PARTIES TO THE CONTRACT

I. ASSIGNMENT

§ 73. Transfer of beneficial interest

THE right to property and its enjoyment constitutes ownership. This includes the legal title and the beneficial interest. The owner may part with the beneficial interest and retain the legal title. Thus another may gain the right to enjoy the fruits of the property. Courts of law do not recognize beneficial ownership, and such owner must obtain relief in equity. Only the holder of the legal title can claim recognition in a court of law.

During the early days of any people, tangible property only is known, and its transfer is accomplished by bodily delivery or by giving some symbol indicative thereof. The conception of intangible property, and its transfer, requires a refinement of thought which develops later. The primitive Roman, German, and English law did not permit the transfer of a chose in action.¹

In the case of a contract there was a further objection to an assignment. The promisor obligates himself to a particular individual. This was thought to be personal in all cases, and hence it was believed that only the promisee could enforce rights under a promise.²

¹ See Pollock & Maitland, *History of English Law*, 1st ed., Vol. II, pp. 223, 224.

² According to Coke (Coke's Littleton, 214 a) the explanation is to be found in the doctrine of maintenance. This view is repeated even

At an early period lawyers devised a plan by which the transfer of a chose in action, although not possible directly, could be accomplished in effect. This was done by means of a power of attorney, authorizing the proposed transferee to enforce the claim in the name of the principal, by action or otherwise.¹

The modern written assignment was developed in this way. It takes the place of the ancient power of attorney, and has the same effect. It follows that the assignment of a contract does not pass legal title, but empowers the assignee to sue in his assignor's name.

This is a legal doctrine. No equitable principle is involved, notwithstanding an erroneous notion which prevailed at one time. Blackstone² speaks of an assignment as being in the nature of a declaration of trust, and Story³ also treats an assignee as having "an equitable right or interest." This idea is not unnatural, as the assignee has only the beneficial interest, while the legal title remains in the assignor. If Courts of law had failed to offer a remedy, there is no doubt that equity would have taken jurisdiction. As the remedy provided at law has proved ample, there has been no occasion for equitable relief.

Should any special circumstances make this remedy in-

to-day. See Bishop, *Contract*, last edition (1907), § 1179, citing Coke and Blackstone.

It is now recognized by the best authorities that Coke was mistaken, and his explanation incorrect. 2 Spence, Eq. 851; Ames, 3 Harv. L. Rev. 339.

¹ In Rome an assignment was not permitted at first on the ground, apparently, that a transfer changed the substance of the obligated performance. A novation was necessary. Later they devised the plan of giving a power of attorney, permitting an action to be brought in the name of the assignor as with us. Puchta, *Institutionen* (8th ed.), Vol. II, § 267; Windscheid, *Pandekten*, (4th ed.), Vol. II, p. 253.

The German Civil Code provides specifically for assignments. Defenses and set-offs against the assignor are available against the assignee. Provision is also made as to notifying the obligor. See §§ 398, 404, 409, 410.

² Commentaries (Sharpswood's ed.), Bk. 2, p. 442.

³ Story, *Equity Jur.* c. 1057 a.

adequate, there would be ground for equitable jurisdiction, but not otherwise.¹ Such a situation would arise if the assignor should propose to release the assigned claim, or should refuse the use of his name for the purpose of suit.

Any defense or set-off existing against the assignor at the time of the assignment, or previous to notice thereof to the obligor, can be urged against the assignee, because he does not hold the legal title. Therefore it is immaterial whether the assignee is a purchaser for value or not.²

The requisites of an assignment are well expressed by Shaw, C. J., as follows:³

"But in order to constitute such an assignment, two things must concur: First, the party holding the chose in action must, by some significant act, express his intention that the assignees shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security if there be one, bond, deed, note, or written agreement, upon which the debt or chose in action arises; and secondly, the transfer shall be of the whole⁴ and entire debt or obligation, in which the chose in action consists, and, as far as practicable, place the assignee in the condition of the assignor, so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable."

There is, however, one notable exception to the rule thus developed. In the case of bills of exchange and prom-

¹ *Hammond v. Messenger*, 9 Sim. 327; *Walker v. Brooks*, 125 Mass. 241. See also Ames, *Cases on Trusts*, pp. 60, 61, notes and authorities cited.

² At first sight it might appear that this circumstance would warrant the intervention of equity. But the result is due to the substantive law, and not to any failure of the law courts to give an adequate remedy. An equity judge is as much bound by the substantive law as a common-law judge. He cannot ignore the positive law as to legal title nor change the results which flow from absence of such title.

³ *Palmer v. Merrill*, 2 Cush. 282.

⁴ As the assignment must be of the whole claim, a transfer of a portion only thereof gives no rights at law, and hence equity takes jurisdiction in such cases. See Ames, *Cases on Trusts*, pp. 61, 63, notes.

issory notes, legal title passes by transfer when made in requisite form. The origin of this difference is historical. Bills of exchange were first invented by Lombard¹ merchants, and their custom established this peculiarity. In England the Courts were reluctantly compelled to recognize these instruments, but owing to the opposition of Lord Holt,² an Act of Parliament was necessary to put promissory notes on the same footing. The result is that the holder of commercial paper can pass the legal title by endorsement. ✓

When the term "negotiable" is applied to such paper, it merely indicates the possibility of passing legal title. This is its characteristic. There is no difference in result between the transfer of a cow, and the negotiation of a promissory note. If a thief steals the cow and sells her to an innocent stranger, she may be recovered by legal process in spite of the *bona fides* of the stranger. Should the same thief steal a promissory note, forge the endorsement, and then sell it to the same innocent stranger, the note may be recovered as readily as the cow. This is so because the legal title has not passed in either instance. The innocent stranger has neither received a title to the cow nor the note. In neither case did the thief acquire title, and therefore could give none. Consequently both cow and note may be recovered wherever found.

Imagine, now, that a business man induces some one by fraud to endorse and deliver to him a note, and also to deliver to him a cow with intent to pass title. If he then sells the cow and transfers the note for value to an innocent third person, the one defrauded cannot recover either cow or note, because the title to each has passed. Thus the innocent purchaser is as fully protected in his title to the cow as to the note.

But suppose in the second illustration the note had been

¹ See Beawe's *Lex Mercatoria*, 448. He thinks that the better view is that they were invented by the expelled Italian Gibelins.

² *Buller v. Crips*, 6 Mod. 29.

drawn to bearer, or endorsed in blank, then the innocent purchaser from the thief could retain the note against the original owner, but not the cow. Although a thief has no title, and could not retain either a bearer-note or money, as against the owner, yet the innocent purchaser does acquire title to them, while this is not true in regard to the cow.

It is, therefore, a characteristic of commercial paper that legal title can pass, but this is not so in the case of contracts of common law origin. The latter are said to be assignable and not negotiable. An assignment does not pass legal title, negotiability does.

This may be illustrated by the case of a promissory note, drawn to the order of the payee, sold by him to a third person, and accidentally delivered unendorsed. Legal title does not pass without endorsement, but here is the equivalent of the assignment of an ordinary contract. Therefore, it has been held that the holder may sue in the name of the payee, precisely as though an actual assignment had been given. The action is brought subject to all defenses against the payee, who still holds the legal title. This was the situation in the case of *Goshen National Bank v. Bingham*.¹

The Court, by Parker, J., says:

"It is too well settled by authority, both in England and in this country, to permit of questioning, that the purchaser of a draft, or check, who obtains title without an endorsement by the payee, holds it subject to all equities and defenses existing between the original parties, even though he has paid full consideration, without notice of such equities and defenses. [Citations.] The reasoning on which this doctrine is founded may be briefly stated as follows: The general rule is that no one can transfer a better title than he possesses. An exception arises out of the rule of the law merchant, as to negotiable instruments. It is founded on the commercial policy of sustaining the credit

¹ 118 N. Y. 349, 354.

of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by endorsement, for value, in good faith and before maturity, they become available in the hands of the holder, notwithstanding the existence of equities, and defences, which would have rendered them unavailable in the hands of a prior holder.

"This rule is only applicable to negotiable instruments which are negotiated according to the law merchant.

"When, as in this case, such instrument is transferred but without an endorsement, it is treated as a chose in action assigned to the purchaser. The assignee acquires all the title of the assignor, and may maintain an action thereon in his own name. And like other choses in action it is subject to all the equities and defenses existing in favor of the maker or acceptor against the previous holder."

The decision is sound. In so far, however, as the learned justice states that "the assignee acquires all the title of the assignor" an error is involved, as the assignee does not acquire the legal title from the assignor. It is just for this reason that *bona fides* does not cut out equities.

The suggestion that negotiability enables anyone to give a better title than he has himself, is also erroneous. It is true of bearer instruments and those endorsed in blank, but not of others. In other words purchase for value without notice does not give title except in the case of the above-named instruments and money.¹

The doctrine which attaches equities to the holder of a legal title unless he has acted *bona fides*, is purely equitable, and applies to the transfer of any title. If the legal title is transferred, the new holder of such title takes it clear of equities, unless the circumstances are such that Courts exercising equitable jurisdiction can attach them.

¹ There are also some instances under recording Acts, and in England sales in market overt produce the same result. See Langdell, Summary of Equity Pleading (2d ed.), §§ 182-185.

In dealing with commercial paper courts of law may have borrowed this doctrine from equity.¹ At least the result is identical.

The characteristics of some contracts render assignment impossible. This is so whenever the contract is personal, and made with reference to some quality in the promisee.² Thus suppose a promise to deliver goods upon credit. The question of credit depends upon the financial standing of the promisee. This right to the goods on credit cannot be assigned. But suppose the contract to be assigned, and the assignee to desire the goods, tendering the cash and not asking credit. In such case the promisor has no reasonable ground for objection, and should perform.³

So also in employment cases. If the work promised is personal, the promisor must perform. If, however, there has been performance, and payment alone remains due, there may be assignment.⁴

In employment cases the personality of both employer and employee is involved. Should the employer die, his executor cannot exact performance.⁵ This is true only when the employment has a personal element,⁶ but generally this would be the case. The test is whether the promisor will be put to any disadvantage or may reasonably object. Can he realize his just expectations under such an assignment?

Rights under a contract may be assigned but not obligations. No one can relieve himself of obligations by passing on his burdens.

In England the Sovereign may sue in his own name upon

¹ See Langdell, *Summary of Equity Pleading* (2d ed.), §§ 182-185; Ames, *Summary, Bills and Notes*, Title, Purchase for Value without Notice, p. 863.

² *Farrow v. Wilson*, L. R. 4 C. P. 744.

³ *Arkansas Valley Smelting Co. v. Belden*, 127 U. S. 379.

⁴ *Carter v. Nichols*, 58 Vt. 553; *Stubbs v. Holywell R'y Co.*, L. R. 2 Exch. 311; *Devlin v. Mayor*, 63 N. Y. 8.

⁵ *Lacy v. Getman*, 119 N. Y. 109.

⁶ *British Wagon Co. v. Lea*, L. R. 2 Q. B. Div. 149.

a contract assigned to him, as may also an assignee from the Sovereign.¹ The same is true of the United States when an assignment is made to that government.²

Assignments may take place by operation of law, in which case the legal title may pass, as in the case of executors or administrators. So, too, under acts of bankruptcy, and in a few instances where statutes vest the legal title in receivers.

Upon an assignment, notice should be given promptly to the obligor. If one, in ignorance of an assignment, pays his debt to the original creditor, or takes a release for value paid, or performs his promise, no objection can be raised by the assignee.³ But should he pay money or do other act under his contract after knowledge of the assignment he performs at his peril, and is still responsible to the assignee.⁴

In some jurisdictions statutes enable an assignee to bring the action in his own name.⁵ These statutes affect procedure only, and not the legal title which remains in the assignor. Thus suppose a New York contract assigned in New York. Should the assignee sue in a state adhering to the Common Law he must do so in the name of his assignor. The New York statute does not change the substantive law.⁶

Where statutes cause a change of title, this substantive change should be recognized in all jurisdictions.⁷

¹ *Lambert v. Taylor*, 4 B. & C. 138, 150.

² *United States v. Buford*, 3 Peters, 12, 30.

³ The burden of establishing notice is upon the assignee. *Heermans v. Ellsworth*, 64 N. Y. 159.

⁴ *Legh v. Legh*, 1 B. P. 447; *Littlefield v. Storey*, 3 Johns. 425.

⁵ For example, see N. Y. Code of Civil Procedure, §§ 1909, 1910.

⁶ *Green v. Busey*, 5 Mack. 233.

⁷ See for this entire subject, Ames, 3 Harv. L. Rev. 337-342, and authorities cited.

II. THIRD PERSONS AS BENEFICIARIES¹**§ 74. When allowed to recover**

After years of fluctuation and doubt, the common-law rule in England is now "that no stranger to the consideration can take advantage of a contract, although made for his benefit."² In Massachusetts, also, the same result has been reached,³ although recovery was allowed in the earlier cases⁴ of this character.

But generally throughout the United States a different view has prevailed. As stated⁵ by Justice Davis:

"The right of a third party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country."

This statement, so far as it goes, indicates the existing situation.⁶

A thoughtful writer suggests that a mistake has been made in attempting to solve this question in conformity with the doctrine of consideration in special assumpsit.

He states it thus:

¹ Special acknowledgment is here made to the able discussion and review of this question contained in an article by Professor Williston entitled "Contracts for the Benefit of Third Persons," 16 Harv. L. Rev. 767. See also 15 Am. L. Rev. 231; 17 Albany L. Jour. 240; 4 N. J. Law Rev. 197, 229; 8 Harv. L. Rev. 93; and note by Huffcut, Anson on Contract (2d Am. ed.), 282.

² Tweddle v. Atkinson, 1 B. & S. 393.

³ Marston v. Bigelow, 150 Mass. 287.

⁴ Felton v. Dickinson, 10 Mass. 287.

⁵ Hendrick v. Lindsay, 93 U. S. 143, 149.

⁶ Professor Williston says (15 Harv. L. Rev. 780): "But Massachusetts, Connecticut, Michigan, Minnesota, New Hampshire, Vermont, Virginia, and to some degree Pennsylvania, do not allow an action. In Connecticut, Michigan, Vermont, and Virginia, however, it seems that a suit in Equity might be maintained." And see authorities cited by him.

"The real question is, however, a much broader one. Is there any substantive right of action conferred by the law of England on the beneficiary of a contract independent of assumpsit and therefore independent of the doctrine of consideration, *i. e.*, independent of his having furnished the consideration and of his being the promisee?"¹

The writer then proceeds to show that from early times, and long before the action of assumpsit arose, the English common law was familiar with the idea of an obligation caused by placing something in the hands of one person to be delivered or accounted for to a third. In illustration he refers to the development of the common-law action of account to a point where one not a bailiff, receiving rents from tenants to be paid to their landlord, could be forced to account to such landlord. Ultimately an action of debt was permitted, if the bailee refused to account to the beneficiary.²

A similar thought is found in *Dutton v. Poole*,³ when counsel, *arguendo*, said:

"If a man deliver goods or money to H, to deliver or pay to B, B may have an action because he is to have the benefit of the bailment, so here the daughter is to have the benefit of the promise."

The same general idea has been familiar to Equity in the doctrine of trusts. Indeed Professor Williston suggests that the English Courts could hardly have adhered to their rule, if they had not strained to find a trust where none really existed.⁴

But in all these examples property is placed in the hands of one person for the benefit of another, and the action is based on property rights of one kind or another. Even in

¹ Professor Herring, *History of the Beneficiary's Action in Assumpsit*, *Select Essays in Anglo-American Legal History*, Vol. III, p. 343.

² *Idem*, p. 353.

³ 2 Lev. 211.

⁴ 15 Harv. L. Rev. 775, citing *Moore v. Darton*, 4 De G. & S. 517, as an illustration.

debt the theory is the same. This is not analogous to a promise, and these instances do not solve the problem.

It is apparent that the difficulties which have been felt do not spring from an adherence to the doctrine of consideration and special assumpsit, as suggested, because the lawyers of Rome experienced the same trouble with this class of cases as have also the modern Germans.¹

Probably the Courts have been influenced often' by the idea that an equitable doctrine was at the foundation of the right claimed, although the action was at law. Thus in *Lawrence v. Fox*,² the main opinion ended with these words:

"No one can doubt that he (*i. e.* the defendant) owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff; . . . if, therefore, it could be shown that a more strict and technically accurate application of the rules applied would lead to a different result (which I by no means concede) the effort should not be made in the face of manifest justice."

Two things are noticeable in the above quotation, first, that the Court refers to "manifest justice," as distinguished from technical accuracy, which clearly indicates an equitable doctrine, and second, the reference to the "duty" of the defendant. This phrase suggests the nature of the obligation which accrues to the third person in a certain class of these cases.

An examination of the question reveals the difficulties involved.

The rights normally growing out of a contract entitle the promisee to performance or damages arising from a breach, with the power to extinguish the contract by mutual consent. When a third person obtains rights, it follows that the original parties cannot extinguish their own contract,

¹ Winscheid, *Pandekten* (4th ed.), Vol. II, § 316 *et seq.*

See also quotation by Williston, 15 *Harv. L. Rev.* 775.

Recovery by third person beneficiary is now allowed in Germany in this class of cases. German Civil Code, §§ 328-335.

² 20 N. Y. 268.

and further that the promisee loses his right to performance or to sue for a breach of the promises made to him, otherwise the promisor becomes liable to two actions for damages for one breach. How and why has the promisee lost his rights? In some instances these objections are rather nominal than real, but in others they are serious and of practical importance.

A just solution of these questions may be found by ascertaining what, in fact, the parties contemplated when they made the contract. If it is found¹ to have been their object to benefit some third person, and to give him the rights growing out of the contract, there appears to be nothing but a technical violation of theory in permitting him to sue, while by so doing the promisee is deprived of no just expectations. Thus in *Dutton v. Poole*,² without question, the father contemplated benefit for his daughter and not for himself.

But in some cases it is evident that the parties contemplated nothing of the kind. While some third person may benefit by the performance of the contract, this was not the object in view, and, under these circumstances, to allow such person to bring an action for breach of the contract, is not only unjust to the promisee, but gives the third person benefits to which he is not fairly entitled. Thus, in *Lawrence v. Fox*³ it is reasonable to suppose that when Holly delivered to Fox the money held to meet the debt to Lawrence, he exacted a promise of payment to Lawrence as security for himself. It is entirely unjustifiable to deprive Holly of rights thus secured, and there is no good reason why Lawrence should have been given this undeserved and un contemplated benefit.

To allow action by a third person, in such a case, not only violates principle, but works injustice.

¹ This question of fact should be determined by the Court, and the plaintiff should establish his right to sue.

² 2 Lev. 211. See *infra*, p. 236.

³ 20 N. Y. 263. See *infra*, p. 240.

It will be of assistance to group the cases which have arisen under the following heads:

1. Contracts made for the purpose and in contemplation of benefiting a third person, there being no duty legal or equitable due to such person from the promisee, as in *Dutton v. Poole*,¹ and *Buchanan v. Tilden*.²

2. Contracts made for the payment of money to or the performance of some other obligation for a third person; the object being to protect the promisee, and the promise exacted for that purpose, and not to benefit the third person, as, in *Lawrence v. Fox*.³

3 Cases of assumption of a mortgage by the grantee in a deed.

4. Insurance policies for the benefit of third persons.⁴

§ 75. (a) CONTRACTS INTENDED TO BENEFIT THIRD PERSONS

Certain early English cases were cited in *Bourne v. Mason*⁵ (1669) which fall under this head.

In one there was a promise to a father, in consideration that he would give his daughter in marriage with the promisor's son, to settle land upon them. The son was allowed to recover. In another there was a promise to a physician that if he did such a cure the promisor would give such a sum to himself and another sum to his daughter. Action by the daughter was allowed.

The Court approved these cases because in one the son "did the meritorious act," and in the other "the nearness of the relationship gives the daughter the benefit of the consideration performed by the father." In agreeing that the daughter may sue, the Court seems to have the notion that it is equivalent to a suit by the father, because of the

¹ 2 Lev. 211.

² 158 N. Y. 109.

³ 20 N. Y. 268.

⁴ Cases of novation are not included here, because they do not properly fall under the head of third persons beneficiaries. They are cases of new contracts taking the place of others extinguished by mutual assent. See *infra*, p. 273. See also *Borden v. Boardman*, 157 Mass. 410.

⁵ 1 Vent. 6.

nearness of the relationship. Not very satisfactory reasoning, certainly.

A few years later, in 1677, *Dutton v. Poole*¹ was decided. There a father, who was about to sell a wood to raise portions for his younger children, forbore, at the request of the son, who was his heir, and in consideration of the son's promise to pay £1000 to his daughter and younger children. The daughter brought action against the son for non-payment of this sum. After verdict for the plaintiff, it was moved in arrest of judgment that the action should not have been brought by the daughter, but by the father. The case was twice argued, and after considerable hesitation judgment was given for the plaintiff. This was affirmed by the Exchequer Chamber.

Finally in 1861 the question was settled in England by *Tweddle v. Atkinson*.² The plaintiff had married the daughter of William Guy. To effectuate arrangements made prior to the marriage, and provide a marriage portion, a memorandum was signed by the two fathers whereby each promised the other to pay £200 to the plaintiff. Guy died without having paid, and this action was brought against his executor. A recovery was not allowed. In his opinion Crompton, J., made the remark often quoted:

"It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued."

This had reference to bilateral contracts, but it is difficult to see why it does not apply equally well to unilateral contracts, which the English Courts have never found it monstrous to sustain. Even as applied to bilateral contracts the statement seems inappropriate. At best there is merely a technical difficulty, and a recovery would carry out the intention of the parties and need involve no injustice to the defendant. However, as a result of this decision, no action

¹ 2 Lev. 210.

² 1 B. & S. 393, 398.

is allowed in England by third persons not parties to the contract, except in the case of insurance policies where the rule has been modified by statute.

In the United States modern illustrations of cases of this character will be found in *Todd v. Webber*¹ and *Buchanan v. Tilden*,² where recovery was allowed.

In the first case the father of an illegitimate daughter promised relatives of the mother that if they would support and educate the daughter during his life he would make sufficient provision for her in his will to pay for such expenses. He did not keep this promise, and the daughter was allowed to recover against his estate for the breach.

In the second case the defendant Tilden promised Buchanan to pay \$50,000 to Mrs. Buchanan, and she brought the action. At Tilden's request, and in consideration of the above promise, Buchanan obtained funds to enable Tilden to carry on his litigation seeking a construction of certain trusts in the will of the late Governor Tilden. Mrs. Buchanan had been taken into the family of Governor Tilden's brother, and considered as a daughter, but as there was no legal adoption, she could receive nothing in case the Tilden trust should be declared void, as happened later. Hence neither she nor her husband could benefit in any way from the result of the action, except through this promise. The Court of Appeals was strongly impressed by the equity of the plaintiff's case, and finally sustained her judgment.³

There are many cases of this character in the various State and Federal Courts of the United States.

The reasoning in this class of cases is unsatisfactory, but the result is just. In all of them the promise was made for the purpose of benefiting the third person. A breach entitles the promisee to no substantial damages, for he has suffered

¹ 95 N. Y. 181.

² 158 N. Y. 109.

³ The opinion of the Court of Appeals in this case is unique. It requires rare skill to write an opinion, and yet avoid basing the decision upon any known principle of law. See a review of this case by the author in his *Cases on Contract* (2d ed.), Appendix C.

none. As the contract was not made for his benefit, and he agreed, knowing this, he is deprived of no just expectation when he loses the privilege to sue or to extinguish the contract. Any rights of his would be purely technical, and without substance.

On the other hand, the promisor voluntarily undertook to furnish the benefit to the third person, and he has received his consideration for so doing. It would be a breach of duty on his part to fail to perform his promise, and he should be liable to action therefor. Its nature would seem to be tort.¹

As the actual promisee has no real interest in the contract, and has suffered no damage by its breach, there is no reason for joining him in any action, and hence the procedure at law meets the requirements of the case as well as would that of a court of Equity. Actions of this character should be allowed, and there seems to be no violation of principle in permitting the third person to sue for such breach of duty. The prevailing American view gives accurate effect to the intention of the contracting parties.

§ 76. (b) CONTRACTS NOT INTENDED TO BENEFIT THE THIRD PERSON

In this class of cases some obligation exists which is due from the promisee to the third person, and the object of the

¹ In *Bohanan v. Pope*, 42 Me. 93, the Court quotes with approval the language of Bigelow, J., in *Brewer v. Dyer*, 7 Cush. 337, 340, to the effect that these cases do not rest upon any supposed relationship between the parties, "but upon the broader and more satisfactory basis, that the law operating upon the act of the parties creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded."

It is not unusual to enforce an obligation arising from a duty. This is done in the case of executors. A bequest can be enforced by the beneficiary only because the law places a duty upon an executor, and the same idea may well explain these cases. See Langdell, "A Brief Survey of Equity Jurisdiction," 13 Harv. L. Rev. 537. In this article Professor Langdell gives the distinguishing features of duties and points out wherein they differ from obligations. The liability placed upon public carriers and innkeepers is a well-known duty.

promisee is to protect himself, and not to benefit such third person.

In an early English case,¹ decided in 1651, a father gave goods to his son, in consideration that the son should pay £20 to Starkey, the plaintiff. Judgment was given for the plaintiff. Chief Justice Roll said:

“There is a plain contract, because the goods were given for the benefit of the plaintiff, though the contract is not between him and the defendant, and he may well have an action upon the case, for here is a promise in law made to the plaintiff, though there be no contract in fact, and there be debt here.”

The conclusion that the goods were given for the benefit of the plaintiff seems to be a pure assumption on the part of the Court.

In 1669 *Bourne v. Mason*² was decided. One Parrie was indebted to Bourne and the defendants in two several sums of money, while a stranger was indebted in another sum to Parrie. Defendants promised Parrie to pay Bourne the amount owed to him by Parrie in consideration that Parrie would allow defendant to use his name to collect the amount due from the stranger to Parrie. The defendant recovered from the stranger, but refused to pay Bourne, who then brought this action. Recovery was not allowed because Bourne “was a stranger to the consideration.”

In *Crow v. Rogers*³ assumpsit was brought on the following facts: One Hardy was indebted to Crow to the amount of £70. It was agreed between Hardy and Rogers, the defendant, that Hardy should convey a house to Rogers, and Rogers should pay Hardy's debt to Crow. Upon demurrer, judgment was given for defendant.

In 1833 *Price v. Easton*⁴ was decided. One William Price owed the plaintiff £13. He was employed by defendant, who, in consideration that Price would leave his

¹ *Starkey v. Mill*, Str. 296.

² 1 Str. 592.

³ 1 Vent. 6.

⁴ 4 B. & Ad. 433.

wages with defendant, promised him to pay the plaintiff the said £13. The wages were, accordingly, left with the defendant, who did not pay the £13 to the plaintiff. The action was not allowed.

Thus, through a long series of years the English Courts refused to allow an action in cases of this character.

In the United States the leading case is *Lawrence v. Fox*,¹ decided in 1859. There had been previous decisions in New York and other jurisdictions, but this case has had a prevailing influence throughout the country.

The facts were these. One Holly loaned Fox \$300 at his request, stating that he owed that sum to Lawrence for money borrowed, and had agreed to pay him the next day. Fox, in consideration of the loan to him, promised to pay the sum to Lawrence the next day. This he did not do, and the action was begun. Lawrence was allowed to recover.

It is evident that the contract was not made for the benefit of Lawrence. Holly desired to protect himself, and there does not appear to be any reason for imposing a duty upon Fox in favor of Lawrence, although the Court seems to think that non-payment by Fox was a breach of such duty. Neither does "manifest justice" seem to require that the action be allowed. Lawrence had suffered no change of position. He still had all his rights against Holly, and there is no suggestion that Holly was insolvent. Why, then, should Lawrence be allowed to take advantage of a contract not intended for his benefit, and the breach of which caused him no damage? There was certainly no trust imposed upon Fox, because the money was loaned to him for his own use and benefit, and he was fully justified in using it for his own purposes. Two of the justices endeavored to sustain the action on the theory of an agency; but the facts gave no warrant for such theory, and it was pure fiction to find anything of the sort. Such a fiction only obscures the real situation and causes confusion. On the whole, this particular case seems to deserve all the criticism which it has received.

¹ 20 N. Y. 268.

With some slight variations, *Lawrence v. Fox* has been followed in most States in this country.

The rule in New York, as limited by the authorities subsequent to *Lawrence v. Fox*,¹ was stated in *Vrooman v. Turner*² as follows:

"There must be, first, an intent by the promisee to secure some benefit to the third party, and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise or an equivalent from him personally."

These limitations were not observed in *Little v. Banks*,³ *Todd v. Webber*,⁴ or *Buchanan v. Tilden*,⁵ and it is a matter of some doubt as to just what the rule is in New York.⁶

There appears to be no sound reason for the limitations stated above. It should not make any difference whether legal or equitable obligation exists between the promisee and the third person. Such obligation did not exist in the three cases given above, and it seems probable that the dislike which the Courts have felt for the general rule has led them arbitrarily to limit its operation as far as possible.⁷

As a final result, recovery by a third person beneficiary is never allowed in England, while generally in the United States the opposite view prevails.

When the promise is intended by the promisee to benefit the third party, a recovery may well be permitted, but, on the other hand, when no such intent exists, the rule refusing

¹ 20 N. Y. 268.

² 69 N. Y. 280, 284.

³ 85 N. Y. 258.

⁴ 95 N. Y. 181.

⁵ 158 N. Y. 109.

⁶ As the entire subject has been carried further in New York than elsewhere it has seemed wise to give special attention to the cases of that State.

⁷ Finch, J., in *Wheat v. Rice*, 97 N. Y. 296, 302, says: "We prefer to restrict the doctrine of *Lawrence v. Fox* within the precise limits of its original application."

recovery seems to be the better. In such cases there is neither hardship nor injustice in refusing to allow a recovery.

It has been suggested¹ that a Court of Equity could work out justice in these cases, and by its procedure protect all parties. Thus in *Lawrence v. Fox*, by joining Holly, which could not be done at law, the various rights of the parties could be protected, and the possibility of two actions against Fox upon one promise would be avoided. The theory upon which the jurisdiction is based is that Holly, who is a debtor of Lawrence, has an asset, namely a promise, in the hands of Fox. Hence the creditor of Holly seeks this asset from Fox.

This suggests some idea of garnishment. But in such cases the action is against the debtor, and the garnishee is simply notified not to pay until the action is settled. It is in the nature of an attachment.

If the debtor Holly is insolvent there seems to be reason why Equity should give its aid. But if Holly is solvent, why should Lawrence be permitted to interfere with assets in the hands of Fox, and further, the remedy at law is ample for the enforcement of Lawrence's original claim. It is true that the suggested analysis does give the opportunity to bring all the parties before the Court, and would work a better result in such cases as *Lawrence v. Fox* than is possible in the present action at law. In so far it would be an improvement. But unless Holly is insolvent, this does not give us any justification for permitting the action by Lawrence at all.

On the other hand, in cases such as *Dutton v. Poole*, no advantage would be gained by the procedure in Equity. The promisee has no substantial interest in the contract, except to benefit the third person, and he does not seem to have any rights which require protection or adjudication. He suffers no loss, and hence can prove no damage. To deprive him of the right to sue does him no injustice and merely carries out his intention.

¹ Williston, 15 Harv. L. Rev. 777.

§ 77. (c) ASSUMPTION OF A MORTGAGE

In cases where there has been an assumption of a mortgage in a conveyance by the mortgagor to a grantee, the mortgagee is very generally permitted to bring an action against the grantee upon the assumption. This is allowed even in jurisdictions where a third person is not otherwise permitted to bring an action. In such jurisdictions it is customary to account for the action on the ground of subrogation, but clearly this equitable doctrine has no application.

If the situation were such that the mortgagor by paying the mortgage debt would extinguish security which the mortgagee held against the grantee, there might be occasion for the application of the rule. But there is nothing of the kind here. In these cases the Courts say that the mortgagor becomes a surety upon the assumption by the grantee, which does not give occasion or necessity for subrogation. The mortgagee has all the security he ever had, and the assumption is clearly not intended for his benefit.

In jurisdictions which accept *Lawrence v. Fox* there is no difficulty, as there is no distinction between the cases. In New York the requirement that the promisee must be under some obligation to the third person is applied to assumption cases¹ as well as all others. If this modification is adopted at all it should be applied here, of course, as well as elsewhere.

§ 78. (d) INSURANCE POLICIES

Cases of this character properly fall under the same head as other contracts intended for the benefit of third persons.² Recovery should be allowed by any third person for whose benefit such contracts are intended. In England, however, the Courts refused to make any exception,³ and the subject

¹ *Ante*, p. 241.

² *Clever v. Mutual Reserve Fund Life Assoc.*, 1 Q. B. 147.

³ 45 & 46 Vict. c. 75, § 11.

was regulated by statute¹ permitting the action, as is also the case in Massachusetts. In most States the Courts have permitted a recovery by the third person beneficiary, as readily as in other cases of this character.

§ 79. (e) COVENANTS FOR THE BENEFIT OF THIRD PERSONS

In New York and other States in which the effect of a seal has been regulated by statute, no distinction has been drawn in this respect between a covenant and a simple contract.²

In jurisdictions where a seal is given its common law effect, only parties to the specialty are permitted to sue upon it, and this is so even though such action would be allowed were it a simple contract.³

§ 80. (f) DEFENSES BY PROMISOR AGAINST A THIRD PERSON BENEFICIARY

The obligation of the promisor should be subject to the happening of any condition precedent, express or implied in law. In this respect the situation is to be regarded precisely as though the action were brought by the promisee himself, and the third person as plaintiff ought to establish the happening of such event. This should be so whether the condition is some outside uncertain event or is something to be done by the promisee. Otherwise the promisor will be bound to something which he never promised. When the condition is something to be done by the promisee, it is in his power to defeat the action of the third person by omitting to perform the act. But this does not differ from any contract conditioned upon acts by a third party.

There seems to be no good reason why equities existing

¹ Stat. 1894, § 225.

² *Coster v. Mayor*, 43 N. Y. 399.

³ *Harms v. McCormick*, 132 Ill. 104; *Hendrick v. Lindsay*, 93 U. S. 143.

between the original parties should not be available against the third person. It was so held in *Dunning v. Leavitt*.¹

When the defense is a release or rescission between the original parties, this should not be permitted. If the third party is entitled to any right it arises by the contract, and such right must, on principle, come into existence the instant there is a contract. This is well stated by Walker, J., in *Bay v. Williams*² as follows:

"It has ever been held by this Court that such a promise inures to the benefit of the person for whose benefit it is made, and the right to sue is vested in him by force of the agreement itself. It has never been held by this court that the express assent of the beneficiary is essential to his right to avail of its benefits; nor has it been held to have force as an agreement to the person in whose favor it was made, he must discharge his debtor, and accept the maker of the new promise as his debtor."

After the third person has accepted, adopted, and in some manner acted upon the promise, it is generally considered that the original parties cannot release or vacate the same.³ Whether the original parties can release the contract before it has come to the knowledge of the third party is left uncertain in some cases.⁴

By some Courts it is said that the promise may be released before any suit brought by the third person. Just why this point should be selected as fixing the rights of the parties is not apparent, unless it is that the third person is regarded as having his election between his original remedy and the new promise, which election is made when suit is begun.⁵

¹ 85 N. Y. 30.

² 112 Ill. 91.

³ *Gifford v. Corrigan*, 117 N. Y. 257.

⁴ *N. Y. Life Ins. Co. v. Atkins*, 125 N. Y. 660; *Kelly v. Roberts*, 40 N. Y. 432.

⁵ This would seem to be the true theory, although there may be some question as to just the point when the election becomes conclusive. In *Bohanan v. Pope* (42 Me. 93) the Court says: "The two remedies are not concurrent, but elective, and an election of the latter implies an abandonment of the former."

In *Trustees v. Anderson*¹ the Court says:

"But the act of release or discharge, to be effectual, must be *bona fide*, and not merely for the purpose of thwarting the mortgagee and depriving him of an equity to which he is entitled. Where a person, in consideration of a debt due from him, agrees with his creditor that he will, in discharge of it, pay the amount to the creditor of the latter, in discharge or on account of a debt due from the latter to him, though the agreement may be *bona fide* rescinded by the parties to it for considerations or reasons satisfactory to themselves, and without account or liability to the creditor who is not a party to it, yet, if the promisee be insolvent, and the rescission be merely a forgiving of the debt for the mere purpose of defrauding the creditor of the promisee or protecting the promisor against his liability, the rescission will not avail in equity."

This supports the suggestion made by Professor Williston, that the third person may recover on the theory that the promisor in reality holds an asset of the debtor, and hence in equity the creditor can have this asset applied to his own claim, and any attempt to release it is fraudulent.²

This also sustains the view suggested above,³ that the application of this doctrine must depend upon the insolvency of the promisee.

The various views advanced from time to time show the difficulties felt by the Courts as to the ground upon which recovery should be allowed.⁴ The idea of agency has been suggested, but this involves a pure fiction. There is no basis, in fact, for any such claim. Nothing warrants mentioning such a theory, except that judges have suggested

¹ 30 N. J. Eq. 366.

² 15 Harv. L. Rev. 767.

³ *Supra*, p. 242.

⁴ Finch, J., says in *Gifford v. Corrigan* (105 N. Y. 223): "Of course it is difficult if not impossible to reason about it without recurring to *Lawrence v. Fox*, 20 N. Y. 268, and ascertaining the principle upon which its doctrine is founded. That is a difficult task, especially for one whose doubts are only dissipated by its authority, and becomes more difficult when the number and variety of its alleged foundations are considered."

it. Novation is equally out of the question. Such a supposition necessitates the idea that the third person has himself made a contract which has been substituted for the original by the consent of all the parties. Of course, there is no foundation for any such supposition.

Where the contract is extra-commercial, and intended solely for the benefit of the third person, the true theory seems to be that the law imposes a duty upon the promisor, and recovery should be allowed for breach of such duty, irrespective of the contract. The duty is based upon and springs from the contract, and hence can include no more than the contract, yet the duty is something imposed beyond the contract.¹

In commercial cases there seems to be no ground for imposing a duty upon the promisor. The third person ought to have no rights under the contract, and it is a fiction to say it is intended for his benefit. No recovery ought to be allowed in such cases.

Possibly, if the Courts had distinguished between these classes of cases they might never have sustained *Lawrence v. Fox*,² and similar commercial cases, while perhaps the English Courts might have avoided the injustice and hardship involved in such a case as *Tweddle v. Atkinson*.³

¹ See *ante*, p. 238.

² 20 N. Y. 268.

³ 1 B. & S. 393.

CHAPTER IV

STATUTE OF FRAUDS¹

29 Car. II. c. 3

SECTION 4. "No action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; 2, or whereby to discharge the defendant upon any special promise, to answer for the debt, default or miscarriages of another person; 3, or to charge any person upon any agreement made upon consideration of marriage; 4, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; 5, or upon any agreement that is not to be performed within the space of one year from the making thereof; 6, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."

§ 81. THE EFFECT OF THE STATUTE IS TO PROVIDE A RULE OF EVIDENCE

The drafting of this statute was not carefully supervised before its original passage, and the difference of phraseology found in the various sections accounts for some of the litigation which its enactment has caused. Moreover the Courts were hostile, and their construction of the terms and requirements was frequently technical and captious, thus limiting its operation, and causing it to be looked upon with disfavor. In later years a more favorable view has prevailed, but a

¹ This chapter is concerned only with section 4 of the statute, and its general application to all contracts falling within its terms.

long line of decisions has hampered the Judges, and made it difficult to construe the statute liberally. The modern statutes of frauds in the United States are based mainly upon the original Act. There are some changes of language made with a view to meeting the old decisions,¹ but generally the Courts have treated these changes with scant regard, being inclined to find that no change in meaning was intended, and that the old rulings still prevail.

As a result of the various cases the correct view seems to be that the statute provides a rule of evidence only,² and does not affect the contract itself or its origin.

The language of section 4 is that "no action shall be brought whereby to charge . . .," while that of some modern statutes is "Every agreement shall be void unless . . ."

Nevertheless the decisions lead to the necessary conclusion that these provisions affect the methods of proof only. Accordingly we find that though a contract clearly falls within the statute, and no writing has been signed, yet if a sufficient memorandum is obtained before action brought, the requirement is satisfied.³ But the contract in such cases arises at an earlier date if at all, and the subsequent memorandum cannot give life to that which never existed before. So too, if the statute is not pleaded, lack of writing does not avail, because the defendant is supposed to have waived the defense. Yet waiver cannot make that a contract which did not exist when the action was brought. Again, if it is desired to use the contract for any collateral proceeding writing is unnecessary and it may be proved without it.⁴

¹ For example, some State statutes contain the phrase "no contract shall be valid," and others the words, "every agreement shall be void." Some have the word "subscribed" instead of "signed," or have added as an exception, "mutual promises to marry."

² *Bird v. Monroe*, 66 Me. 337; *Townsend v. Hargraves*, 118 Mass. 325; *Britain v. Rossiter*, 11 Q. B. Div. 123; *Leroux v. Stephens*, 84 Fed. Rep. 922, 925. But see *Miller v. Wilson*, 146 Ill. 523.

³ *Mason v. Decker*, 72 N. Y. 595; *Lydig v. Braman*, 177 Mass. 212, 218.

⁴ *Townsend v. Hargraves*, 118 Mass. 325; *Cowan v. Adams*, 10 Me. 374.

Looked at from any standpoint, it seems clear that the statute does not affect the formation of contract, but the proof merely.

The Courts have not been entirely consistent, however, and have held that a memorandum or other writing to meet the statute's demands must be obtained before an action is begun. This seems to be illogical. If a contract exists and there is a breach, why should not an action lie at once, with or without a sufficient memorandum? If the statute is not pleaded as a defense, the necessity for writing no longer exists, and the action proceeds, but, if the defense is interposed, this action becomes futile, even though there may be a subsequent writing. In other words the pleading in this instance has an unusual effect, and in some mysterious way does more than raise an issue. It is not a plea in abatement, and it is difficult to say what it is. Why should it be necessary for the plaintiff to meet the statute until he desires to prove the contract? At that point an objection to evidence of an oral contract would be fatal, and it appears to meet every requirement if the memorandum is procured at any time before its introduction. It is now too late, probably, to undo the error.

§ 82. "TO CHARGE ANY EXECUTOR OR ADMINISTRATOR
UPON ANY SPECIAL PROMISE TO ANSWER DAMAGES
OUT OF HIS OWN ESTATE"

This clause is limited to promises by such representatives to pay estate debts out of their own pockets. The statute does not affect independent obligations, not due from the estate, but undertaken by the executor or administrator. Thus a promise by an executor to pay \$1000 in consideration that the promisee refrain from bringing an action against the estate, is not within the statute.¹ This is an independent contract with which the estate is not concerned.

¹ *Bellows v. Searle*, 57 Vt. 164.

§ 83. "PROMISE TO ANSWER FOR THE DEBT, DEFAULT OR MISCARRIAGE OF ANOTHER PERSON"

This provision applies to any civil default, whether arising from contract or tort.¹ It is sometimes difficult to determine whether a given promise falls within the meaning of this clause or not. Once decide whether the given promise is direct or collateral, independent or conditional, and a test is found. If the liability is dependent upon the default of another person it is within the statute. Suppose this case: A young lady about to attend a ball desired to borrow a diamond necklace from her jeweler. He hesitated, and A, who was standing near, said, "Let her have it, and I will be responsible for its safe return by her." Should the jeweler thereupon comply with this request, A's undertaking would be collateral, and hence within the terms of the statute. A is liable only upon a default by the young woman, and to recover upon his promise such default must be proved as a condition precedent. But imagine another case. A desiring to buy a pair of shoes, B said to the shoemaker: "Let A have the shoes and I will see you paid." This promise is direct and not within the statute. B promised to see him paid, and this is a direct undertaking² in no way dependent upon A's default. In fact it seems probable in such a case that A has assumed no liability.

In *Thomas v. Cook*³ a copartnership was dissolved and one of the retiring partners indemnified by a bond. A bill of exchange was also delivered to him. The plaintiff was induced to become one of the sureties on the bond and bill of exchange by a promise from defendant to indemnify him against loss. This promise was held to be independent and hence outside the scope of the statute. It was a direct promise to indemnify, and not secondary.⁴

¹ *Birkmyr v. Darnell*, 1 Salk. 27.

² *Idem*; *Mount Stephen v. Lakeman*, L. R. 7 Q. B. 196.

³ 8 B. & C. 728.

⁴ *Anderson v. Spencer*, 72 Ind. 315; *White v. Rintoul*, 108 N. Y. 222. And see generally *May v. Williams*, 61 Miss. 125.

§ 84. "ANY AGREEMENT MADE IN CONSIDERATION OF
MARRIAGE"

This refers to agreements other than mutual promises to marry.¹ Thus in *Shadwell v. Shadwell*² the consideration given by the nephew to the uncle was marrying the young woman to whom he was engaged.

§ 85. "ANY AGREEMENT THAT IS NOT TO BE PERFORMED
WITHIN THE SPACE OF ONE YEAR FROM THE MAKING
THEREOF"

The year begins to run from the date of making the contract, and not from the time when performance is to commence. The statute refers to cases which cannot be performed within the year, and not to those which may require more than one year for their performance, but may nevertheless under some circumstances be performed within the year consistently with the agreement.³ As for instance cases where the time is dependent upon some life. This may run for eighty years or may terminate in three months. This was well expressed by Allen, J.,⁴ as follows:

"The statute as interpreted by Courts does not include agreements which may or may not be performed within one year from the making thereof, but merely those which within their terms and consistent with the rights of the parties cannot be performed within that time."

In *Fenton v. Emblers*⁵ there was an agreement whereby the plaintiff would become the housekeeper and servant of May, and take the care and management of his family, and he would pay her stated wages and leave her a certain annuity

¹ Browne, Statute of Frauds (5th ed.), § 215 a.

² 30 L. J. C. P. 145.

³ *Peters v. Westborough*, 19 Pick. 364.

⁴ *Kent v. Kent*, 62 N. Y. 560, 564.

⁵ 3 Burr. 1278; *Blake v. Cole*, 22 Pick. 97.

by his will. She performed the services for more than three years, but on the decease of May it was found that no annuity was provided. The agreement was held not to fall within the statute, because it was possible that, pursuant to its terms, performance might take place in less than a year, as May might die within that period. Mr. Justice Dennison said:

"The Statute of Frauds plainly means an agreement not to be performed within the space of one year, and expressly and specifically so agreed. A contingency is not within it; nor any case that depends upon contingency. It does not extend to cases where the thing only may be performed within the year; and the act cannot be extended further than the words of it."

In *Britain v. Rossiter*¹ the plaintiff entered the defendant's service as clerk and accountant for one year. The agreement was consummated on Saturday, April 21st, 1877, and the service was to begin on Monday, April 23d. This was held to be within the statute.

A contract is within the statute when its terms require more than one year for performance, even if through some modification of terms it might by some possibility be actually performed within the year.

Thus in *Boydell v. Drummond*² "the defendant had agreed to take and pay for a series of large prints from some of the scenes in Shakespeare's plays. The whole were to be published in numbers: and one number, at least, was to be published annually after the delivery of the first." This agreement was held to be within the statute, because even though the publishers could finish and tender the entire series within the year, they could not compel the defendant to take and pay for them at that time.

¹ 11 Q. B. D. 123, 128. To the same effect it was held in *Spencer v. Halstead*, 1 Den. 606, that a contract made in March for one year's board and room rent to begin in the following May was within the statute.

² 11 East, 142. A portion of this statement is quoted from the opinion of Wilde, J., in *Peters v. Westborough*, 19 Pick. 364.

CHAPTER V

OBLIGATIONS OTHER THAN SIMPLE CONTRACT

I. PROMISES UNDER SEAL

§ 86. NATURE AND EFFECT

A COVENANT is a promise under seal, and it is customary to discuss such promises in treatises upon consensual contracts. They differ radically, however, from such contracts in their origin, historical growth, and essential elements. There must be a writing, signed, sealed and delivered¹ by the promisor, and no consideration is needed. Covenants existed long before any such doctrine was known to our law. The expression "a seal imports consideration" states a pure fiction, causes confusion, and is of no advantage. In the course of time these instruments became obligations by their own force. They are not evidence of a promise, but the promise itself. Destroy the instrument and the promise is gone.²

Covenants in deeds of land, which add to or limit the enjoyment thereof, often have further attributes attached to them by the Common Law, and are known as "covenants running with the land." It may well be doubted whether such covenants are really sealed promises, as they have especial peculiarities of their own.

Covenants under seal form a class of obligations by themselves. As they are not consensual in their character they

¹ But see *Xenos v. Wickam*, L. R. 2 Eng. & Irish App. 296, and discussion *infra*, at p. 258.

² In certain cases equity permitted proof of the instrument when destroyed, thus preserving the obligation itself. Most jurisdictions have embodied these equitable doctrines in statutes.

require no agreement,¹ and while in the United States there must be delivery to render them complete, this is not on account of the doctrine of mutual assent.

Offers under seal may always be revoked. The various texts on contract frequently allude to "offers under seal," and such offers are described as irrevocable. It is an anomaly to say that there can be an irrevocable offer, whether under seal or not, and the cases² do not seem to warrant the conclusion that such a thing is possible. This suggests the question, what is an offer under seal, and how does it differ from any other offer? The doctrine of consideration applies to promise, and if there is a promise under seal at Common Law it requires no consideration. What application has that to an offer, and what peculiarity is there about a seal which can work any change in its character? An offer is not connected in any way with the doctrine of consideration. It requires none, and hence a seal can have no effect either way. If in any case it is found as a fact that there is a sealed promise, then no difficulty exists, and it is simply a confusion of ideas to talk about an offer. But if it is not a promise, then why talk about a consideration which can have nothing to do with an offer? As actual consideration can play no part in the case of an offer, how can a seal play any greater part?

What effect can a seal have upon an offer? Shall we talk about an offer as a specialty, or about delivering an offer? It is out of place, and if an offer happens to be reduced to writing, the addition of a seal is a mere surplusage. Suppose a man writes and seals his offer, then meeting the offeree

¹ But see Leake, Contract, p. 134. He says: "They involve the element of agreement, inasmuch as the parties by executing the deed agree to the matter contained in it." Of course there may be agreement where both parties execute the instrument, but the agreement is not essential. It is true that no one can be forced to accept such an instrument, and in that sense consent is necessary just as it is in the case of a gift, but that is a different thing from the agreement required in consensual contracts.

² See cases *infra*, p. 256.

It is conceivable that estoppel might produce such a result. See discussion *ante*, at p. 86.

reads it to him, can any one imagine that this is ineffective as an offer, and that there must be delivery of the instrument? The more the idea is examined the more incongruous it appears.

But Williston says:¹ "So an option or offer under seal is irrevocable during the time which it specifies." The language of some of the cases which he cites certainly seems to warrant this statement, but a close examination indicates that the Court in each case was really construing the facts as constituting a contract upon condition, and not as an irrevocable offer.

Thus in *Willard v. Taylor*² the case arose on a bill in Equity praying for the specific performance of a covenant in a lease. The covenant provided that the lessee should have the right or option of purchasing the premises at any time before the expiration of the lease. It was really a promise to sell although crudely worded. The Court used language which would indicate that the arrangement was looked upon as an offer. Mr. Justice Field saying:

"The covenant in the lease giving the right or option to purchase the premises, was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and being under seal, must be regarded as made upon a sufficient consideration, and therefore one from which the defendant was not at liberty to recede. When accepted by the complainant by his notice to the defendant, a contract between the parties was completed."

Although this was said to be in the nature of a continuing offer, it was in fact a covenant.

The relief prayed for was granted, and properly so. The attention of the Court, in many of these cases, was centered upon the question whether they could grant relief, in view

¹ Williston's *Wald's Pollock*, p. 28, n. 28. It will be observed that Professor Williston's statement is made within the narrow limits of a note. Were he writing at large, he might or might not agree with the above views.

² 8 Wall. 557.

of the fact that plaintiff was bound to nothing prior to his notice of election; in other words, that the contract was unilateral. They do not discuss the question raised above.

*Johnson v. Tripple*¹ is clearly a case of conditional promise and so is *Mansfield v. Hodgdon*.² In the latter case Holmes, J., treats it as a covenant to sell, and not as an offer. Towards the end of the opinion he says:

"The defendant Hodgdon's undertaking not having been a mere offer, but a conditional covenant to sell, bound him irrevocably to sell in case the plaintiff should elect to buy and pay the price."

But it does not follow that there could not have been a revocation had it been no more than an offer.

*McMillan v. Ames*³ is another case cited as an illustration of an irrevocable offer under seal, but here also there was clearly a covenant to convey upon condition. In *O'Brien v. Boland*⁴ the Court treated the transaction in the same way, saying: "In the present case, because the offer was made under seal, it was an irrevocable covenant, conditional upon acceptance."

In *Walker v. Bamberger*⁵ the Court speaks of an option as an offer, saying:

"If a person offers to sell a piece of property to another, or to transfer a chose in action, and agrees to keep the offer open to a given day, or for a reasonable time, during which the person to whom it is made may accept, that is an option; and the person making the offer will be bound to keep it open if a sufficient consideration for so doing is given, but he will not be bound without such consideration."

The arrangement was to permit a certain person to take stock at a price, and reads — "If on or before November

¹ 33 Term Rep. 530.

² 33 Minn. 257.

³ 17 Utah, 239, 246.

⁴ 147 Mass. 304, 307.

⁵ 166 Mass. 481.

28th, 1896, W. S. Furgate pays you . . . ” There was no question of revocation and no dispute as to Furgate’s right. The Court treated the contract as one to keep an offer open, and quite likely it was. Specific performance was not asked, and the only question touched upon in that aspect of the case was whether there was a binding contract, as there certainly appears to have been.

The case of *Xenos v. Wickham*¹ has occasioned considerable comment among legal writers. It was an action upon a policy of marine insurance. The insurance was effected by a broker. After some preliminary steps, not material to the question, the broker subscribed the customary slip which was initialed by a clerk of the defendant company. The broker then drew a three months’ bill on plaintiffs for the premium, and this was paid at maturity. Shortly after, the defendant filled out the policy from the slip. It was dated May 1, and read at the end, “signed, sealed and delivered.” According to the custom, the company held this policy subject to call by the plaintiffs, and charged the broker with the amount of the premium. At the usual time a bill was sent to the broker, accompanied by the policy. The broker’s clerk said it was a mistake, and subsequently called at defendant’s office and had the policy marked cancelled.

The Court found that the broker had no authority to direct the cancellation. Under the English Statutes the Court held it to be settled that no step prior to the policy could be considered, and hence the policy alone gave the plaintiffs any rights they might have. This precluded any consideration as to the effect of the preliminary slip, and cut out all preceding acts. It seems that the form of the policy was not settled in advance, and it was suggested that the plaintiffs might have objected to the provisions and rejected it. The House of Lords decided the case in plaintiffs’ favor, holding that the company was liable upon the policy.

¹ L. R. 2 Eng. & Irish App. 296.

Holland,¹ in a note, sharply condemns the case, and cites with approval a German author who calls it "ein juristisches Monstrum." In his text he gives the case as an authority for the proposition that "an offer by deed is irrevocable."

Anson says: "The question as to an offer under seal arose" in the case. He considers that "The situation in such a case is anomalous." He further says that the case is irreconcilable "with the modern analysis of contract as meaning an expression by at least two persons of a common intention whereby expectations are created in the minds of one or both," and Huffcut² states in a note that "It is believed there is no authority supporting *Xenos v. Wickham*." Leake refers to the case in three different places.³ He does not appear to regard it as requiring particular comment, nor does he treat the policy as an offer under seal. Pollock and Williston⁴ accept the decision calmly, and the former points out that holding a promise under seal to be irrevocable is merely carrying out the historical idea of these sealed instruments.

Holland and Anson in the above-quoted sentences seem to have misunderstood the case. It certainly does not stand for the proposition that "an offer by deed is irrevocable," for which Holland cites it as an authority, nor does it raise the question of "an offer under seal," as stated by Anson. No question of offer is involved. Under the English Statutes, as ruled by the Court, nothing but the policy could be considered. The action was brought upon the policy as a subsisting obligation. Unless it was a complete obligation it was nothing at all. It certainly was not an offer. The defendant company advanced no proposal for the acceptance of the plaintiffs. The theory of an irrevocable offer would not explain *Xenos v. Wickham*. How can an action be

¹ Jurisprudence (11th ed.), p. 277 and note.

² Anson, Contract (2d Am. ed.), p. 43.

³ Contract (3d ed.), pp. 114, 445, 511.

⁴ Williston's Wald's Contract, pp. 6, 55, and notes.

brought on a mere offer? Suppose it cannot be revoked — the situation is not changed. Even if it be admitted that it still exists, no obligation is shown. An offer must be accepted before it becomes a promise. Here we have an existing obligation without having the preliminary step of offer. Further we must have as the first essential of offer communication to the offeree.¹ In this case the Insurance Company simply held the policy without any communication to plaintiffs or their agent. It was in no sense a proposal which the Company hoped the offeree might accept, but sprang into life fully equipped as an obligation. Plaintiffs might have refused to receive the policy or they might have destroyed it, but nevertheless it would have had an existence as an obligation. One tenders a book to another for a price, it may be refused, and thus no debt arises for such price, but the book exists just the same. As it was a sealed instrument, modern law requires a technical delivery, but Leake² seems to have treated the case correctly when he says that the retaining of the policy on behalf of the insured was equivalent to a delivery in escrow. It is clear that the policy was not a consensual contract, but that is not any cause for perturbation. Harriman³ seems to have the sound view when he suggests that it is an instance of an obligation arising by the action of one party without any reference to acquiescence on the other side. If the obligee rejects it, that terminates its existence, but otherwise it continues. The obligee, in this case the insured, upon taking the obligation either became indebted for the premium or by his acts impliedly promises to pay the amount. In this instance, as plaintiffs have already paid the agent, nothing is due from them. If they had repudiated the policy they might have recovered back the amount paid on the theory of failure of consideration, and the nature of the action would have been quasi-contractual. Obligations of this

¹ See *supra*, p. 13.

² Contract (2d ed.), § 511.

³ *Idem*, § 617.

character are not unfamiliar to the Common Law,¹ and we see the same idea brought out in equity when a person declares that he holds money or other property in trust for some third party who is ignorant of the trust.²

In *Xenos v. Wickham* we have a situation, it is true, in which the policy, although in force, may be repudiated by the obligee. He may, perhaps, wait until the ship is lost, and then demand the insurance, or if she comes through in safety, repudiate the policy. But the Company can easily meet the difficulty by presenting the policy at once, and thus force the obligee to take it or repudiate immediately.

§ 87. (a) STATUTORY MODIFICATIONS OF THE LAW AS TO SEALS

In modern times the tendency has been to do away with the effect of a seal, and treat such promises as though they were ordinary consensual obligations. In several western States all differences have been abolished by statute. In many other jurisdictions a half-way course has been pursued. The New York Statute is a fair example of legislation of this kind, its language being almost identical with that of several other States and of England. This statute³ says that a seal "is only presumptive evidence of a sufficient consideration, which may be rebutted as if the instrument were not sealed."

Just what is the effect of these statutes? In New Jersey the statute⁴ is almost identical in language with that of New York, and there the Courts construe it as affecting only such instruments as were not intended to be gratuitous. In the case of *Aller v. Aller*⁵ the Court says:

¹ See Williston's *Wald's Pollock*, note as to promissory notes and cases cited, p. 56, n. 63.

² See cases cited by Ames, *Cases on Trusts*, p. 125, n. 1.

³ N. Y. Code of Civil Procedure, § 840.

⁴ Act of April 6, 1875 (Rev. p. 387, § 52).

⁵ 40 N. J. Law, 446.

"But because deeds have been used to cover fraud and illegality in the consideration, and just defenses have been often shut out by the conclusive character of the formality of sealing, we have enacted in our state the two recent statutes above quoted.¹ The one allows fraud in the consideration of instruments under seal to be set up as defense, the other takes away the conclusive evidence of a sufficient consideration heretofore accorded to a sealed writing and makes it only presumptive evidence.² This does not reach the case of a voluntary agreement, where there was no consideration and none intended by the parties."

The explanation of this case seems to be that the Court construes the statute as permitting in these instances the introduction of an equitable defense to an action at law. The question should be — is it a case where a Court of equity would give affirmative relief or would it refuse relief because plaintiff is a volunteer? This idea seems to have been in the mind of Vanderburgh, J., when, in discussing a covenant, he said:³

"It is true that Equity will not lend its auxiliary remedies to aid in the enforcement of a contract which is inequitable, or is not supported by a substantial consideration, but at the same time it will not on such grounds set it aside."

There is an existing obligation, but Equity will not enforce it. The statute allows the same defense in a law action. This renders these statutes intelligible, and the effect easily understood. But the situation is more complicated in States where, as in New York, equitable defenses in law actions were already allowed to the fullest extent prior to the passage of such a statute as those we are con-

¹ Refers to the statute cited *supra*, p. 261, n. 2 and to Rev. p. 380, § 16.

² No question concerning any rule of evidence is raised by these statutes. As by the common law no consideration was required, any evidence on that point would have been immaterial. Materiality is a question of reason and judgment, not of any rule of evidence. See Thayer, Preliminary Treatise on Evidence, p. 265.

³ *McMillan v. Ames*, 33 Minn. 257, 260.

sidering. What then is the effect of the statute under such circumstances? The New York Courts have said:¹

"The obligor has the right to avoid the instrument, if he can, by showing that there was no sufficient consideration for the contract, but the onus is upon him to establish this."

Under the New York Statute what is the effect of a gratuitous covenant at the time of delivery? Is there an obligation or not? If there is no obligation, upon what does plaintiff recover when defendant fails to establish affirmatively lack of consideration, and why it is not necessary for plaintiff to prove all the essentials of his obligation? An affirmative defense admits the obligation, and sets up some new matter. Is this an affirmative defense, or if not, what is it? If there is any obligation, what is the theory of this defense? It is difficult to find any satisfactory explanation of the theory upon which the statute is based. It is not one of those cases where one can say that it is simply an arbitrary enactment, and let it go at that, because cases arise which make it important to determine the underlying idea.²

In the case of *Schnell v. Nell*³ there was a promise under seal to pay \$600 in three future installments in consideration of a promise to pay one cent at once. The defense set up lack of consideration and a demurrer thereto was overruled.

The Court found that the instrument was intended as a gratuity, and that the promise to pay one cent was not serious, "merely nominal and intended to be so." The decision seems indefensible on any theory. If the Court had adopted the New Jersey idea, a recovery could have been allowed without any difficulty. But taking the view that the

¹ *Home Ins. Co. v. Watson*, 59 N. Y. 390, 395.

² *Harriman* says (*Contract*, 2d ed., § 85): "The effect of such statutes is to change, not a rule of evidence, but the very nature of contracts under seal."

³ 17 Ind. 29.

defense may always prove lack of consideration, the case is still wrong, because a promise to pay one cent to-day is certainly a consideration for a promise to pay a larger amount in the future. A demurrer to the declaration was overruled, clearly on the theory that a cause of action was stated. But as the promise to pay one cent as a consideration was plainly set forth in the instrument, what more did defendant need? Why must he still further establish affirmatively that which the plaintiff himself alleges?

There must be some force in the instrument itself, as the plaintiff can recover upon it unless defendant takes affirmative action. As it has such force even when it appears affirmatively in the declaration that there is no consideration, what has the statute done to it, and what is the theory which makes the establishment of a fact in defense more effective than the same fact alleged by the plaintiff?

The case of *Vanderbilt v. Schreyer*¹ suggests some further questions. The action was brought to foreclose a mortgage. A judgment of foreclosure had resulted in a sale and deficiency. The claim against the defendant, Schreyer, was upon a sealed instrument, executed and delivered by him, assigning the mortgage foreclosed in the action and guarantying its collection by foreclosure and sale. Plaintiff having proved the mortgage and the assignment containing the guaranty, rested. The defendant, Schreyer, offered to prove facts showing no consideration for the guaranty, but the proof was rejected, and plaintiff recovered judgment for the deficiency.

By this rejected testimony the defendant offered to prove that the plaintiff had contracted with certain other parties to erect these buildings for them. The interest, if any, of defendant Schreyer, in this contract does not appear. When the houses were "topped off," the plaintiff Vanderbilt, was to be paid \$5000. This payment was to be made by assignment to him of the mortgage in suit, Schreyer being the mortgagee and holder. At the proper time an assignment of this

¹ 91 N. Y. 392.

mortgage was rendered to plaintiff, who refused to receive the same unless Schreyer would guaranty collection. Plaintiff thereupon refused to continue the work, and delayed two months, when an assignment containing the demanded guaranty was delivered. The work was then completed and the balance paid.

The Court of Appeals reversed the judgment, and ordered a new trial on the ground that the excluded testimony offered by defendant Schreyer would show, if the facts were established, that the plaintiff was, at the time the guaranty was delivered, under contract to complete the buildings, and hence neither his doing so nor his promise therefor could amount to a consideration to Schreyer.

Excluding other interesting points suggested in the case, it illustrates some singularities in the application of the statute modifying the effect of seals. When Schreyer delivered the instrument there either was or was not a guaranty *eo instanti*. Delivery was essential, and unless the obligation arose then it never came into existence. But the theory seems to have been that completing the houses was intended as a consideration. There does not seem to have been any pretense of a promise to do the work. Therefore, even though plaintiff had not already been under contract, no promise of guaranty would arise until the consideration was furnished, *i.e.*, until the work was done. But the delivery took place long before that, and hence if not effective then, it never could become so.

There is nothing to indicate that Schreyer was interested in the completion of the houses or requested the plaintiff to complete them. He says in his answer that he acted "under protest," "under compulsion." How, then, could completing the houses become a consideration under any theory?

It is to be noted that the obligation of a covenant at common law is not affected by equity. A court of equity has no power to declare that there is no obligation when the law declares there is. Thus when equity says that it will not specifically enforce a covenant because defendant is a

volunteer, it does not declare that there is no existing obligation, but simply refuses to give its peculiar relief.

When there is a question of undue influence, fraud, or unreasonable restraint of trade, the absence of any value given will be strong evidence in favor of setting the instrument aside as illegal. But all this has nothing to do with the doctrine of consideration. A technical common-law consideration having no substantial value would not help the situation at all.

II. SO-CALLED CONTRACTS OF RECORD

§ 88. OBLIGATIONS CLASSIFIED UNDER THIS HEAD ARE JUDGMENTS AND RECOGNIZANCES.¹ THEY ARE NOT CONTRACTS IN THE MODERN SENSE OF THE TERM

It was formerly the custom to describe contracts as falling into three classes. In *Taylor v. Root*² Woodruff, J., stated this classification as follows:

"Contracts are of three kinds: simple contracts, contracts of specialty, and contracts of record. A judgment is a contract of the highest nature known to the law."

Of this list simple contracts alone can properly be classed as contracts to-day. As Miller, J., says³ of a Judgment: "Here is no element of contract, no consent of minds, no services rendered for which the law implies an obligation to pay."

It is clear that these obligations are not contracts in the modern sense of that term. They have entirely different characteristics, and the old confused classification cannot stand careful modern analysis.

¹ Statutes merchant, statutes staple and recognizances in the nature of statutes staple were classified under this head. Williston's *Wald's Pollock*, p. 141. These English obligations are obsolete and have never been known in this country.

² 4 Keys (N. Y.), 335, 344.

³ *Steamship Co. v. Joliffe*, 2 Wall. 450.

Holland suggests¹ that "the English barbarism 'a contract of record' as descriptive of, among other things, a judgment"—is due to the paucity of our legal language. While it is unfortunately true that we are sadly deficient in scientific legal terminology, it seems more in accord with the historical facts to attribute this and other phrases to the incomplete conception of a consensual agreement, and to a real confusion of thought in the classification of these obligations, enhanced in the case of the modern contract by its development through the action of *assumpsit*.

A recognizance is an obligation based upon the acknowledgment of a debt in a Court of Record before a judge or other authorized official, and entered in the records thereof. In early times it was much used as a security for debt, and after the period fixed therein for payment, upon default, execution could issue at once as upon a judgment.²

¹ Jurisprudence (11th ed.), p. 256, n. 1. He quotes from *Bidleson v. Whytel*, 3 Burr. 1545, "a judgment is no contract, nor can be considered in the light of a contract; for '*judicium redditur in invitum*.'"

² Leake, *Contract* (3d ed.), p. 141. See also Pollock & Maitland, *Hist. Eng. Law* (1st ed.), Vol. II, p. 202.

CHAPTER VI

DISCHARGE OF CONTRACT

§ 89 EXTINGUISHMENT BY DISCHARGE

THE discharge of a contract operates by extinguishing the obligation. It is sometimes said that a conditional contract carries its own provisional discharge.¹ This is not an accurate conception, however. A discharge relieves from the obligation to perform, while in the case of a condition there may never be such obligation, and the contract remain unbroken, even though actual performance does not take place. In fact, in the case of a condition which does not happen, the promise may be said to be fully performed, even though the thing promised is not given. If the uncertain event named as a condition does not occur, the promisor need not do the act promised, but it is not a case of discharge. On the contrary the promise is fully met and carried out, that is to say, the promisor has kept his promise. He is no more discharged after the contingency has failed to occur than he was before. On the other hand a discharge before breach occurs when a contract which has still the potentiality of requisite action is extinguished, and the obligated parties relieved of the burden which they had assumed. A conditional promisor is not thus relieved by the non-happening of the contingency, because he has no burden of performance, and needs no re-

¹ Thus in *Moore v. Phoenix Ins. Co.*, 62 N. H. 240, there was a clause in a fire insurance policy providing that failure to occupy the premises, or an occupancy increasing the risk, should render the policy void. This was merely a condition, not a discharge. The promise of the company was to pay upon the condition precedent that these things did not happen. Unless they failed to happen there could be no breach and hence no liability to perform, but this would not be a discharge.

lief. He is discharged only in the sense that performance is a discharge.

"Rescission" and "discharge" are generally used as equivalent terms, but Harriman¹ seems to be right in saying that rescission puts the parties back in the position which they occupied before the contract was formed, while a discharge stops everything just as it is. A discharge which makes no reservation or exception leaves the parties with any advantage or loss which may then exist as a result of the contract.²

Imagine a contract for one year's employment at \$1200 per year, payable quarterly. At the end of the second quarter the contract is given up by mutual agreement, no reservation being made for the second quarter's salary just then due. Such a discharge leaves the parties just as they are at the time it occurs, and as the quarter's salary was not excepted no recovery can be had therefor. If this had been a true rescission, questions might have arisen as to a recovery on the theory of a *quantum meruit*.

It is generally said that the discharge of an existing contract must have consideration. When it is based upon a new contract this is a self-evident proposition. But otherwise there is no sound reason for the application of the doctrine of consideration. No promise is involved, and hence no necessity exists for this technical requirement. A solvent man may dispose of his property by gift. Why, then, is it not possible for him to give up his right to the performance of a contract by a gratuitous oral waiver? It is well settled that there may be such a waiver in the case of a condition,³

¹ Harriman, *Contract* (2d ed.), § 397.

² In *McCreery v. Day*, 119 N. Y. 1, 5, Andrews, J., says: "Where a contract is rescinded while in the course of performance, any claim in respect of performance, or what has been paid or received thereon, will ordinarily be referred to the agreement of rescission, and in general no such claim can be made unless expressly or impliedly reserved upon the rescission." Leake on *Contracts*, 788, and cases cited."

It will be noticed that the term "rescission" is employed in the above extract, where there is clearly a discharge.

³ See *supra*, Chap. II, Conditions, p. 220.

and there is no reasonable room for doubt that a person may likewise gratuitously¹ waive a chose in action.

The gift of a chattel takes effect by delivery, and the difficulty regarding an oral gratuitous extinguishment of a chose in action arises from the fact that the Courts have regarded such discharge as a gift, the transfer of which must be indicated by writing.² Hence before execution it is looked upon as enforceable only as a promise, which gives rise to the idea that a consideration is requisite. Thus in *Carpenter v. Soule*³ the Court says:

"But as an actual payment at once extinguishes the debt whether promised to be endorsed, or in fact endorsed or not, so an actual present gift of the whole, or a part of the debt, operates at once to extinguish it completely or *pro tanto*, whether endorsed upon the instrument which is the evidence of the debt or not. . . . There must be a delivery of the gift, the donor must part with his dominion over it, it must not rest in a mere promise."

When there is the gift of a chattel title passes,⁴ but this is not so in the event of a discharge. The right is simply extinguished and there should be no more difficulty than in the case of any waiver, as this term is simply another way of expressing the idea of the extinguishment of the right or defense waived.⁵

¹ But see Williston, *Cases on Contract*, Vol. II, p. 574, n., with authorities and cases cited.

² That this was the view of the Courts in the early cases is indicated by a statement in *Flower's Case* (circa 1597), Noy, 67, to the effect that "otherwise it had been, if A had only offered it to F, for then it was a chose in action only, and could not be given without a writing."

³ 88 N. Y. 251, 257.

⁴ Title to a chose in action cannot pass (see *supra*, p. 227) even where there is a written agreement. Hence this gift must take effect by extinguishment.

⁵ Professor Williston in a note says (*Cases on Contract*, Vol. II, p. 575, n.): "In New York a doctrine obtains that a written acknowledgment by a creditor of receipt in full payment will discharge the debtor, though given without consideration." He cites as authority for this *Gray v. Barton*, 55 N. Y. 68; *Ferry v. Stephens*, 66 N. Y. 321;

I. BY AGREEMENT

§ 90. (a) BY MUTUAL PROMISES

"Eodem Modo quo oritur, eodem Modo dissolvitur"

Any contract may be modified or abrogated¹ by a new binding agreement, and when this is bilateral, as is usually the case, each promise supplies the necessary consideration for the other. When the original promise is under seal some jurisdictions hold that any modification thereof must be by a sealed instrument,¹ and others that a covenant may be

Carpenter v. Soule, 88 N. Y. 251; *McKenzie v. Harrison*, 120 N. Y. 260.

This statement is too broad, and not borne out by the cases cited. They merely enunciate the proposition, very generally prevailing, that when there exists the intent to make a gift by discharge of a debt or of a chose in action, this can be done by appropriate action removing it from the realm of promise, for instance, by giving a receipt in full with such intention. The receipt effectuates the existing intention, and may even be regarded as something in the nature of an assignment. Thus the Court said in *Gray v. Barton* (55 N. Y. 68, 73): "But when, to complete his purpose of giving the debt, he executed and delivered to the defendant a receipt in full for the account, to effect the intention of the parties, the law will construe the instrument, if necessary, as an assignment of the account, and of the right of action thereon to the defendant."

The remaining New York authorities cited are of the same character as *Gray v. Barton*, and are decided on the same principle.

In New York, as elsewhere, a receipt in full is merely an admission, and as such is only *prima facie*, and may be rebutted by evidence showing that nothing has been paid and no gift intended. This is pointed out in *McKenzie v. Harrison* (120 N. Y. 260, 265). The Court says: "There undoubtedly is a distinction between releases under seal and an ordinary receipt given on the payment of a sum of money, which is not under seal, the latter being subject to explanation and proof that it was given without consideration."

¹ *Collyer v. Moulton*, 9 R. I. 90; *Killett v. Robie*, 99 Wis. 303; *McMurphy v. Garland*, 47 N. H. 316.

In *McKenzie v. Harrison* (120 N. Y. 260, 263) the Court said: "We shall not question the rule that a contract or covenant under seal cannot be modified by a parol unexecuted contract." And in *Smith v. Kerr* (108 N. Y. 31, 39) the Court said: "The rent was payable under the defendant's covenant and a parol unexecuted agreement to discharge the claim was inoperative and void." But see New York cases cited in the next note.

changed by parol, whether oral or written.¹ When the original contract is within the statute of frauds it is held in some states that any change must comply with the requirements of the statute,² while in others this is held to be unnecessary.³

When the discharge is accomplished by means of a new contract, extinguishment is the result of the doctrine of circuitry of action. Should the second contract be broken by enforcing the first the measure of damages will be the precise amount of recovery for the breach of the first.

Suppose A is under contract with B to pay \$1000 on November 1st. They agree to change this to payment of \$500 on July 1st. Thus the original contract is modified by the exchange of new promises. If B should sue for and recover the \$1000 promised on May 1st, he would thereby break the new contract, and the damages for this breach would be the \$1000 recovered in the first action. In other words B must repay to A the \$1000 he has just recovered from him. The Courts will not allow this and, accordingly, they permit A to set up the second agreement as a defense to the action on the first, which has the effect of extinguishment.

¹ *Canal Co. v. Ray*, 101 U. S. 522; *McCreery v. Day*, 119 N. Y. 1; *Dearborn v. Cross*, 7 Cow. 47; *Munroe v. Perkins*, 9 Pick. 298; *Herzog v. Sawyer*, 61 Md. 344; *Blagborn v. Hunger*, 101 Mich. 375.

It may be said generally that the strong tendency in the United States is to permit a sealed instrument to be modified by parol. Some of the cases suggest that this can be recognized only when the oral modification has been carried out. *McKenzie v. Harrison*, 120 N. Y. 260, 263; *Smith v. Kerr*, 108 N. Y. 31, 39.

² *Hill v. Blake*, 97 N. Y. 216; *Swaine v. Seamans*, 9 Wall. 254, 271, 272; *Barton v. Gray*, 57 Mich. 622; *Wulschner v. Ward*, 115 Ind. 219; *Burns v. Fidelity Real Est. Co.*, 52 Minn. 31.

³ *Buel v. Miller*, 4 N. H. 196; *Stearns v. Hall*, 9 Cush. 31.

In *Long v. Hartwell*, 34 N. J. L. 116, the oral modification is held good when fully executed. See generally *Browne on Statute of Frauds*, §§ 425 *et seq.*

§ 91. (b) BY NOVATION¹

A new contract may be substituted for one already existing, and thus extinguish the original. The change may be in the subject matter, the parties or both. This is known as Novation.² The typical case is the substitution of new parties in place of the old, and this frequently occurs in partnerships. In the simplest example at least three new bilateral contracts are necessary. Suppose a contract between A and B. It is desired to substitute C in the place of B. To accomplish this by novation there must be an agreement between A and B giving up the contract, between A and C substituting C, and between B and C giving up rights on the one hand and assuming liabilities on the other.³

Novation may be brought about by an express contract, or by actions which fairly indicate such an intention. This often takes place when promoters propose to organize a company, and prior to its incorporation make contracts for goods to be supplied to the corporation when formed. Thus suppose the following case. The X company entered into a contract with A, B, and C, by the terms of which the X company agreed to supply to a hotel company which A, B, and C were about to incorporate and organize, certain boilers for which the X company was to be paid \$1800. The hotel company was incorporated and the boilers supplied to it. The X company made out its bill against the hotel company in its corporate name, and had numerous interviews with its manager in reference to payment, demanding that the hotel

¹ The Romans employed this term in the same sense and our law has borrowed the name from them. Gaius, Inst. 111, § 176. See also Windscheid, Pandekten, §§ 353, 354, 355, and notes.

² Bouvier (Law Dictionary) defines novation as follows: "The substitution of a new obligation for an old one, which is thereby extinguished." "A transaction whereby a debtor is discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor by the order of the original creditor."

³ See an able and clear article by the late Dean Ames on Novation, 6 Harv. L. Rev. 184.

company should pay the bill. The hotel company failed and was put into the hands of a receiver. The X company then presented its claim to the receiver. Here the parties clearly indicated an intent to substitute the hotel company in the place of A, B, and C, and without doubt there was novation.

§ 92. (c) BY RELEASE UNDER SEAL

Such release requires no consideration, as it is not a promise. The Courts have invoked the common law doctrine as to covenants, and employed the customary but meaningless phrase "a consideration is presumed."¹ Having reached this point, it is correctly said that the modern statutes modifying the doctrine as to seals have no reference to executed arrangements and hence do not change the law as to releases. In such cases the result is sound although the reasoning is incorrect both historically² and logically.

Referring to a release under seal the Court says in *Homans v. Tyng*:³

"That instrument was under seal and acknowledged, and as the instrument was not executory in its character, the provisions of Section 840 of the Code, making a seal upon an executory instrument only presumptive evidence of a consideration, do not apply."

It is, in truth, immaterial whether these provisions apply or not. Anyone may make a gift of his claim, and the doctrine of consideration has no application, provided there is an executed transfer,⁴ thus rendering it unnecessary to rely upon a promise to give up the claim. When a release is given it amounts to an executed transfer, or its equivalent, an executed discharge.

¹ "Gewöhnlich glaubt der Mensch, wenn er nur Worte hört, Es müsse sich dabei doch auch was denken lassen." Goethe, *Faust*.

² Holmes, *Common Law*, pp. 254, 262.

³ 55 N. Y. App. Div. 383, 387. See to same effect *Green v. Langdon*, 28 Mich. 221.

⁴ *Gray v. Barton*, 55 N. Y. 68.

Occasionally a case is found which appears to hold that a release under seal, for some unexplained reason, requires a consideration; but, generally, a critical examination will show that the decision turns on some other point. Thus in *Reynolds v. Reynolds*¹ the head note reads, "Part payment no consideration for the release of a debt already due." But no question concerning a release under seal was involved and the point turned upon an agreement to give up past due rent. It is not unusual to employ the term release in the general sense of giving up some claim, as was done in the above case. This has led to some confusion, and sometimes to the supposition that the language used is applicable to a release under seal.²

In *Metcalf v. Kent*³ there was an oral statement that no claim for commissions was made. As a mere dictum the Court said:

"The cases cited by the plaintiff's counsel sustain the claim that the release of an existing indebtedness is a new contract, and to be binding must be based upon a consideration."

It is not probable that the Court had in mind a technical release under seal.

In *Wabash Western Ry. Co. v. Brow*⁴ the action was brought against the railway company for injuries suffered. Among other things the company set up a general release from the plaintiff.

Judge Taft for the Court said:

"With reference to the release, we are very clear that the Court was right in charging the jury to disregard it. All the evidence in the case showed that no money was paid, and no employment tendered or received, to fulfil the recited consideration of the release. In the absence of any consideration, the release could not, of course, constitute a bar to the action."

¹ 55 Ark. 369.

² See *Mobile, etc. R. R. Co. v. Owen*, 121 Ala. 505, 512.

³ 104 Iowa, 487, 490.

⁴ 65 Fed Rep. 941, 952.

This position was sound, but unless the facts are carefully considered it might be supposed that it is an authority for the proposition that a release, like a simple contract, requires a consideration. But it is clear that here no gratuity was intended. The plaintiff evidently executed the release in expectation of some profit, and received none. This would be ample ground for refusing to give it force. If plaintiff did not ask profit under the existing circumstances, then the transaction is so suspicious in its character that it bears the badge of fraud, and should be disregarded on that account. The true reason for refusing recognition is equitable, and not based upon any technical requirement of consideration.

II. BY OPERATION OF LAW

§ 93. WITHOUT INTENT OF THE PARTIES

Any discharge of a contract is the result of the application of law to the particular facts of a given case. On some occasions the law accomplishes this irrespective of the intent or consent of the parties. Situations of that character are treated in this section.

§ 94. (a) IMPOSSIBILITY

Sometimes an event occurring or becoming known after a contract has arisen renders performance impossible, and then the party thus prevented may be excused.¹ The impossibility may be caused by a so-called "act of God," or "*vis major*," or by something first arising or becoming known

¹ These exemptions are generally treated as conditions implied in fact, and the Courts frequently refer to them as conditions. Perhaps it is not unreasonable to say that people do unconsciously imply the addition of "*deo volente*" to such promises. On the whole it is deemed better to treat them under the head of "excuse," as this seems to meet the fact more exactly.

after the contract has been formed. Otherwise failure to perform is not excused, the Courts holding that a person should protect himself against difficulties by the terms of his contract. What is covered by the term "*vis major*" is best ascertained by examining the decisions in which the rule is applied. At any rate the defendant must show that performance not only was impossible, but further that the obstruction was of such a nature that it could not have been reasonably anticipated by prudence and foresight, because in that event the emergency should have been excepted from the contract.¹

§ 95. (1) Caused by death, ill health, or by destruction of the subject matter

Often performance by the promisor depends upon the continuation of his life and health, or upon the prolonged existence² of some object. In these cases the law does not attach the usual consequences to a breach, and failure to perform is excused³ on account of the extreme hardship which would be caused by the enforcement of the obligation. This situation arises when the promise involves personality, as where an artist promises to paint a portrait, or an author to write a book or where it necessarily presupposes the continuous existence of an object,⁴ as where a mechanic is to repair a machine. No one but the artist or author in question can perform the promise, and the contemplated repair can be done only to the machine named. Hence the death or sickness of the promisor, or the destruction of the specified machine will render performance impossible.

¹ *Superintendent v. Bennett*, 27 N. J. L. 513.

² *Stewart v. Stone*, 127 N. Y. 500.

This should not be confused with cases where there is a promise to create some object which is destroyed before completion. See *infra*, p. 280.

³ *Spalding v. Rosa*, 71 N. Y. 40; *Hall v. Wright*, 1 E. B. & E. 765.

⁴ *Siegel, Cooper, & Co. v. The Eaton & Prince Co.*, 165 Ill. 550; *Dexter v. Norton*, 47 N. Y. 62; *Ellis v. Midland Ry. Co.*, 7 Ont. App. Rep. 464; *Ellis v. Atlantic Mutual Ins. Co.*, 108 U. S. 342.

*Stewart v. Loring*¹ is a remarkable application of the doctrine under consideration. The plaintiff conducted a gymnasium, and the action was to recover \$10 upon a writing which it was claimed amounted to a contract to teach gymnastics and to pay therefor. The defendant had judgment. He was prevented by sickness from attending the gymnasium at all. The Court pointed out that the writing on its face was a mere offer, calling for a unilateral contract, an offer to pay \$10 in consideration of teaching; of course, under such circumstances no contract arose.

It was assumed, however, that a bilateral contract was intended, and the singular conclusion was reached that, even so, the defendant was not liable. The Court said:

"The parties must have acted upon the assumption of the continued ability of the promisee to give and the promisor to receive the proposed instruction."

This might be sound if the plaintiff had been taken sick, and the consequent failure to give instruction were a breach claimed against him, or if the defendant had promised to attend the gymnasium, and, prevented by sickness, were being sued for such breach. But no such situation existed here. The cause of action claimed was for not paying. His sickness did not prevent that nor would his death. His executor could have paid the \$10 equally well. The doctrine seems to have been misapplied.

Although one may be thus relieved by physical disability, it does not follow that he can in his turn recover from the other party. Where a contract is entire, performance is often a condition precedent to the right to recover, and because one escapes liability he is not thereby relieved from the necessity of performing the condition, if he desires to enforce the contract.²

¹ 5 Allen, 306.

² The Courts generally hold that there can be no recovery on the contract for the services performed, but allow a recovery for their fair value, less any damage the defendant may have suffered by the termination of the services. The theory seems to be based on a principle analo-

§ 96. (2) **Arising from some unsurmountable obstacle first known, or occurring, after the contract has been formed**

The obstacle which will justify a failure to perform, and thus discharge the obligation, must be some overweening necessity equivalent to "*vis major*," or so-called "act of God."¹ If an agreement be possible of performance, it will be enforced, although it may not be possible for the individual promisor to perform. And a contract will not be discharged, although some natural cause may subsequently render performance impossible, unless such contingency be provided against directly or by implication, in the contract itself.²

When a contract is rendered by law in whole or in part impossible of performance, it is to that extent discharged.³

"There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."⁴

gous to unjust enrichment in Quasi-Contract. *Ryan v. Dayton*, 25 Conn. 188; *Coe v. Smith*, 4 Ind. 79; *Ellis v. Midland Ry. Co.*, 7 Ont. App. 464; *Wolf v. Howes*, 20 N. Y. 197. In *Siegel, Cooper, & Co. v. The Eaton & Prince Co.*, 165 Ill. 550, it was held that both parties were excused but that there could be no recovery for work and materials furnished.

¹ *Libby v. Douglas*, 175 Mass. 128; *Beebe v. Johnson*, 19 Wend. 500.

² *Harmony v. Bingham*, 12 N. Y. 99; *Jones v. United States*, 96 U. S. 24; *Wilmington Transportation Co. v. O'Neil*, 98 Cal. 1.

³ *People v. Insurance Co.*, 91 N. Y. 174.

⁴ *Hills v. Sughrue*, 15 M. & W. 233.

The actual result of the decisions seems to be that the doctrine of "*vis major*," or "insurmountable force," is mainly limited to cases of sickness, death or destruction of the subject matter. It would seem to be as easy to anticipate and provide for these possibilities as it is for an unforeseen quicksand or unparalleled tornado, but the Courts have drawn a distinction, excusing the failure to perform in case of death, health and destruction, but not otherwise.

"No rule of law is more firmly established by a long train of decisions than this, that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it in his contract."¹

In *Walsh v. Fisher*² the plaintiff, under contract of employment, had left his work. He claimed to have been terrified by the threats of strikers. The action was for wages at the contract rate for the time he had worked. The Court indicated that a reasonable fear of violence might excuse him for leaving his work, but held that he could not recover on the contract.

In *Lord Clifford v. Watts*³ there was a "covenant that Watts shall work and make trials for clay" under certain land, and "dig and raise from the land an aggregate amount of not less than 1000 tons or more than 2000 tons, of pipe or potter's clay in each year of the term."

The plea to a claim for a breach of the covenant was impossibility of performance, because there was not 1000 tons of clay under the lands. Upon demurrer the plea was held good.

¹ Whelpley, J., in *Superintendent v. Bennett*, 27 N. J. L. 513.

² 102 Wis. 102.

In *Carthage v. Gray* (10 Ind. App. 428) it was held that closing a school pursuant to an order from a board of health, due to danger from diphtheria, did not relieve a school board from paying a teacher who was ready to perform.

³ L. R. 5 C. P. 577.

The Court makes the case turn upon a question of construction, and looks at the covenant to ascertain whether the defendant warranted that there was sufficient clay. The Court says:

"Where a thing becomes impossible of performance by the act of a third person, or even by the act of God, its impossibility affords no excuse for its non-performance; it is the defendant's own folly that has led him to make such a bargain without providing against the possible contingency. . . . There is however no such covenant here; there is only a covenant to work out all the clay under the land, and this covenant was not broken by the defendant's failure to work clay if none was to be found there."

It was endeavored to distinguish the case from *Hills v. Sughrue*.¹ There the charterer engaged to furnish a full cargo of guano from a certain island. He was held to have broken his contract by failing to furnish the cargo. The Court found that an insufficient supply of guano on the island was no excuse.

In such cases as the one in question it is clear that the defense should be sustained, and the fact that the Court recognized this and sought to distinguish the earlier cases by means of construction seems to indicate a decided tendency to soften their rigor. This is wise, whether the change is brought about by construction or by disregarding the earlier decisions as unsound.

It is well settled that an impossibility created by law excuses performance.

Thus in *Cordes v. Miller*² the lease of a wooden building contained a clause providing that in the event of destruction by fire the lessor was to rebuild. The premises were thus destroyed during the existence of the lease, and shortly thereafter an ordinance was passed prohibiting the erection

¹ 15 M. & W. 233.

² 39 Mich. 581.

See in accord, *People v. Globe, etc. Ins. Co.*, 91 N. Y. 174, where performance was prevented by injunction.

of wooden structures. The Court held that this excused the lessor from performing the covenant.

In *Bailey v. De Crespigny*¹ there was a covenant in a lease, whereby the lessee agreed that neither he, his heirs nor assigns would, during the term, permit to be built on a certain plot any buildings of the character described. The breach assigned was the erection of a station on the premises by a railroad to which the plot had been assigned. The defense was that the right to acquire the plot and erect the buildings had been granted by Act of Parliament and that the lease was assigned pursuant thereto. This was held to be good.

§ 97. (b) ILLEGALITY

A contract, lawful at its inception, may become illegal by the happening of subsequent events, and the obligation discharged.

In *Church v. Procter*² there was an agreement by the defendant to supply all the menhaden required by the plaintiff, not exceeding the defendant's catch. The defendant refused to continue performance and at the trial offered to prove in defense that the plaintiffs were taking advantage of the scarcity of herring by putting up and selling the menhaden with false brands and marks calculated to deceive the public, and to make it appear that the menhaden were herring. This evidence was excluded, and on appeal the Court found the exclusion erroneous, holding it material as tending to show illegality.

In *Cowan v. Milbourn*³ there was a contract for the letting of a certain hall to be used for lectures and a ball. The defendant refused to permit the use of the rooms, and alleged, in defense, his discovery, after executing the contract, of the plaintiff's intention to deliver certain irreligious, blasphemous, and illegal lectures. The Court found that this was an unlawful design, and hence constituted a defense,

¹ L. R. 4 Q. B. 180.

² 66 Fed. Rep. 240.

³ L. R. 2 Exch. 230.

whether the defendant knew of the unlawful purpose at the time of his refusal or not.

It is, accordingly, well settled that anyone may repudiate his lawful contract upon ascertaining that it is being used or is intended for illegal purposes, and this discharges the innocent party, furnishing him with a complete defense for non-performance.

§ 98. (c) BY ALTERATION OF AN INSTRUMENT

A promissory note or bill of exchange creates an obligation by its own force. It is not evidence of an obligation, but the obligation itself. It is similar in character to a specialty. Consequently, recovery depends upon the production of the instrument at the trial, intact and unchanged. In England it has been held that destruction or any material alteration, whether made by the holder or another, accidentally or with intention, destroys the instrument and prevents recovery upon it.¹ In the United States it is generally held that this result is brought about only by intentional destruction or alteration in a material point, by the holder.²

§ 99. (d) MERGER

Accepting an obligation of a higher nature and involving the same subject matter as one of a lower order already

¹ *Pigot's Case*, 11 Coke, 27 b; *Master v. Miller*, 4 T. R. 320.

² *Martin v. Ins. Co.*, 101 N. Y. 498; *Wood v. Steele*, 6 Wall. 80. See *McRaven v. Crisler*, 53 Miss. 542. When a note has become void by alteration recovery cannot be had on the original debt. *Smith v. Mace*, 44 N. H. 553.

Section 124 of the Negotiable Instrument Law regulates the matter in all jurisdictions where this law has been adopted. It reads:

"Where a negotiable instrument is materially altered without the assent of all the parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent endorers.

"But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

held, extinguishes the lower which is said to be merged in the higher. Thus a parol contract would be merged in a subsequent covenant, between the same parties and involving the same subject matter. So the obligation to pay damages for the breach of a contract becomes merged in a judgment obtained for such breach.¹ There is no merger when the new security is given as collateral security.²

Merger differs from novation and accord and satisfaction. In novation³ a new contract is substituted for the old by consent and before breach. There is a change either of parties or subject matter. Accord and satisfaction takes place only after breach, and is the substitution of something actually given and accepted in satisfaction of the obligation arising from the breach.⁴

§ 100. (e) BANKRUPTCY

It is possible for a bankruptcy act to provide that a discharge pursuant to its provisions shall extinguish all claims. This is not usual, and a discharge is generally a personal defense only, which may be waived.⁵ Therefore the usual bankruptcy discharge is not a discharge of a contract in any true sense, but simply a bar to the right of action.

III. BY PERFORMANCE

§ 101. PERFORMANCE TERMINATES A PROMISE

A contract performed has fulfilled its function and is extinguished. There may be performance on one side but not on the other, and then only the part performed is dis-

¹ *Runnamaker v. Cordray*, 54 Ill. 303.

² *Leake, Contract* (3d ed.), p. 894; *Ralston, Discharge of Contract*, p. 58.

³ See *supra*, p. 273.

⁴ See *infra*, p. 291.

⁵ *Remington on Bankruptcy*, p. 1589, § 2672; *Dusenbury v. Hoyt*, 53 N. Y. 521.

charged. To bring about a discharge the performance must be complete, and fully cover the act called for. This is the general rule, but substantial performance, accepted by the promisee, may discharge the obligation. Thus suppose work done pursuant to a contract but varying slightly and in unessential details from that promised. If this is accepted by the promisee, he cannot be heard to claim that the contract is broken. On strict principles, a promisee who may be aware of any defect, should either reject performance and rely upon his action for damages or he should be held bound by his acceptance, and the claim be discharged. But there has been a tendency to permit the promisee to accept, and deduct his damage from any payment he may have to make, or if there be nothing due from him to recover his damage in action. It would seem that he should adopt one position or the other and not be permitted to take both the benefits of performance and recovery of damages.¹

Because a promise may not be broken when performance is due, by no means necessarily indicates that it has been performed. A tender made and held good relieves from liability, but is not performance and does not discharge the contract.

IV. BY BREACH

§ 102. (a) ANTICIPATORY BREACH

Ordinarily to prove the breach of a contract it is essential for the plaintiff to establish his case by showing that the time set for performance had arrived before action brought. Otherwise he does not show a cause of action. But an exception to this logical requirement has developed whereby,

¹ The idea is borrowed from equity. But a court of equity can regulate the matter, and modify its decree so as to work justice for all parties. A court of law has not this power. The Courts in working out this theory, both in equity and law, are in reality making a new obligation for the parties.

if one bound by a contract gives notice to the promisee of an intention not to perform when the time arrives, he thereby, at once, becomes liable to an action as for a breach.

No sound argument¹ can be made in favor of this exception, and such action should be considered premature.² Because a man promises to employ another on October 1st and notifies him in August that he will not do so, ought to give no ground for action on September 1st. The employer did not promise to give no notice, and the notice does not constitute a breach of any promise. Such a notice may be withdrawn at any time before the promisee, in reliance thereon, has irrevocably changed his position³ but not thereafter.⁴ The promisee may, at his option, disregard the notice, and wait until the time for performance, and then the notice has no effect.⁵ But he is not permitted to accept the notice and also continue the contract.⁶

As a waiver of conditions such a notice ought⁷ properly to have effect, and the only peculiarity of the rule in question is found in the fact that a premature action is permitted.

¹ Pollock says, "The matter is so plain on principle that theoretical discussion is hardly possible." Williston's *Wald's Pollock*, p. 355.

² "It is true, as is pointed out by the Lord Chief Baron in his judgment in this case, that there can be no actual breach of a contract by reason of non-performance, so long as the time for performance has not yet arrived." *Frost v. Knight*, L. R. 7 Ex. 111.

³ *Kadish v. Young*, 108 Ill. 170.

⁴ *Rayburn v. Comstalk*, 80 Mich. 448.

⁵ *Johnstone v. Milling*, 16 Q. B. D. 460.

⁶ *Idem*.

⁷ *Dingley v. Oler*, 117 U. S. 490.

The notice must be accepted and acted upon. *Zuck v. McClure*, 98 Pa. St. 541.

"A renunciation of the agreement, by declarations or inconsistent conduct, before the time of performance, may give cause for treating it as rescinded, and excuse the other party for making ready for performance on his part, or relieve him from the necessity of offering performance to enforce his rights. It may destroy all capacity of the party, so disavowing its obligations, to assert rights under it afterwards, if the other party has acted upon such disavowal. But we are unable to see how it can of itself constitute a present violation of any legal rights of the other party, or confer upon him a present cause of action."

Per Wells, J., in *Daniels v. Newton*, 114 Mass. 530.

The leading case on the subject is *Hochster v. De la Tour*.¹ It was there argued that a contract gives one the right to have the obligation in force from its inception; that this is one of the advantages which the contract furnishes, the destruction of which constitutes a breach.

"In *Hochster v. De la Tour*, Lord Campbell assigns, as one reason for the decision, that in case of employment as courier, and of promise to marry, a relation is established between the parties by the contract, even before the time of performance; 'they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation;' and 'it seems to be a breach of an implied contract if either of them renounces the engagement.'" ²

There is more force in Lord Campbell's argument when applied to an agreement to marry. Such a promise creates the affianced state, and there is some plausibility in the contention that a breach of this existing state is a present breach. In other words the promise to marry may fairly be said to be a promise to remain in the engaged state until actual marriage. Hence if an engaged man marries any one other than his betrothed, prior to the time when he could be called upon to perform, he thereby breaks the engagement, and thus at once breaks the contract.

Thus in *Frost v. Knight*³ the action was for breach of promise of marriage. The promise was to marry the plaintiff on the death of the defendant's father. While the father was still living, the defendant broke the engagement, and the plaintiff began the action without waiting for the father's death. A judgment for the plaintiff was sustained, the Court holding that the action was not premature.

On the ground given above the decision does not seem

¹ 2 E. & B. 678. See also *Howard v. Daly*, 61 N. Y. 362.

In Massachusetts Courts have repudiated the entire doctrine. *Daniels v. Newton*, 114 Mass. 530. See also *Parker v. Russell*, 133 Mass. 74.

² Wells, J., in *Daniels v. Newton*, 114 Mass. 530.

³ L. R. 7 Ex. 111.

unsound, and is distinguishable from *Hochster v. De la Tour*. To hold that a promise to marry involves an engagement is one thing, but it is quite another to say that a promise to employ on June 1st involves a promise not to give notice of a contrary intention.

The case of *Henry v. Rowell*¹ presents a somewhat remarkable application of the principle of anticipatory breach. The defense was the statute of limitations.

There was a bilateral contract between a brother and sister whereby the brother promised to furnish board and lodging to his sister during her life, and she promised to leave him all her property by will. She lived with him for twelve years, and then left his house clearly indicating that she did not intend to return, and she never did. She died fourteen years later, and left a will bequeathing \$100 only to her brother. The present action was brought to recover the reasonable value of the board and lodging furnished. The Court held that the cause of action arose when the sister left the brother's house, and that it was barred by the statute.

In the course of the opinion the Court, by Mr. Justice Gaynor, said:

"The plaintiff could not maintain a suit in equity for specific performance,² nor an action to recover the value of the property left by the decedent. The only action he could maintain is the one he has brought, *i. e.* to recover the actual damage he has sustained, which he puts at the value of the board and lodging he actually furnished. The cause of action for that did not arise on the failure of the decedent to leave a will giving the plaintiff all of her property by will for one year's or twelve years' board and lodging, but for continuous board and lodging up to her death, if it had continued up to her death, and she had failed to leave all of her property to the plaintiff, that breach would have given a cause of action to the plaintiff. But that is not this case.

¹ 64 N. Y. Supp. 488, affirmed 63 N. Y. App. Div. 620.

² See *contra*, *Colby v. Colby*, 81 Hun, 231; *supra*, p. 27, n.

She did not agree to leave to the plaintiff all of her property for twelve years' board and lodging, and her failure to leave it to him therefore, was the breach of no contract. Nor did she agree to make a fair compensation by will for twelve years' board and lodging, and her failure to do so was no breach. Hence the cause of action sued upon did not arise upon such failure in either case, it being no breach, but upon the prior breach of the contract which occurred, viz.: her said abandonment of it."

This opinion is unique, as is the decision based upon it. The plaintiff promised to furnish board and lodging during his sister's life, and the doing so constituted a condition precedent to the sister's promise.¹ This condition she waived by refusing to remain after twelve years. But she certainly did not promise to stay, and hence the leaving his house was no breach. Granted that her departure was equivalent to a notice that she refused to live longer with the brother, but what of it? As she had not promised to stay, the leaving was neither a breach nor an anticipatory breach. Her sole promise was to leave her property to the brother by will. This promise she did not break until she died without leaving her entire property to him, and hence no action accrued until her death. Consequently the statute had not run. Even should we assume the utterly untenable position that leaving was a notice of intention to break her promise as to the will, and so a possible anticipatory breach, yet the brother was not obliged to accept the notice and could,² as he apparently did, treat the contract as still subsisting, and thus have no cause of action prior to the death.

Of course the theory of the plaintiff's action was entirely wrong. He should have sued for the actual breach of promise, which was the failure to leave all the property to him, and his damage was the value of the property.

The opinion points out correctly the difference between

¹ See *supra*, p. 203, Chap. II, Conditions in Contract.

² *Johnstone v. Milling*, 16 Q. B. D. 460.

an anticipatory breach, which is merely a notification, in advance, of an intention not to perform, and this case as the Court conceives it, because according to the Court's extraordinary view of this contract it was actually broken when the sister left, and if that view were sound there would have been an actual breach at that time. The decision is wrong.

§ 103. (b) BY BREACH

A contract is discharged by its breach in so far as the obligation of the defaulting party is concerned. Questions arising with reference to conditions are often confused with those concerning a breach of a contract. The non-performance of a condition will prevent a breach of the dependent promise, but it is not in itself a breach thereof, although if the act constituting the condition has also been promised, the failure to perform may constitute a breach of such promise, although not of the one limited by the condition.¹ It is immaterial whether the breach of a promise goes to the essence or not. If a promisor is not ready to perform at the time arranged, he has broken his promise whether time is important or not, and he is thus discharged, but is then subject to a new obligation, imposed by law, namely, to pay damages.

The best authorities agree that a promise is extinguished by its breach, and that the obligation to pay damages is a new duty imposed by law. This obligation becomes merged in a judgment. A promise may comprise several independent parts, in which case the breach of one part may not affect the obligation to perform the others.

¹ See *supra*, p. 158, Chap. II, Conditions.

V. ACCORD AND SATISFACTION**§ 104. DISCHARGE BY AN AGREEMENT PERFORMED**

The obligation to pay damages for a tort or breach of contract may be discharged by an agreement, actually performed, to accept something other than money damages, in extinguishment of the claim.¹ The technical name for this arrangement is Accord and Satisfaction. The agreement is the accord and its execution the satisfaction. An accord unexecuted is not a defense.²

Only after the breach of a contract can there be accord and satisfaction, and therefore this arrangement cannot be classified accurately as a discharge. As the contract must be destroyed first by the breach, it can be no longer existent when accord and satisfaction takes place. Nor is the accord in any sense a contract. Execution being essential indicates that the accord is merely an unenforcible agreement.

Should the parties make a new bilateral contract, and intend this as an extinguishment of the original claim for damages, such new contract will constitute an accord executed, being actually put in force, and thus constituting a satisfaction of the accord.³ The existence of such intent is a question of fact, and may be established as well by acts clearly implying this as by express words.⁴

Where the claim for damages is liquidated this cannot be settled by the payment of a smaller sum of money, and hence in such a case there would be no accord and satisfaction upon receipt thereof, even though such might be the intention.⁵

¹ See generally Leake on Contract (3d ed.), p. 755; Langdell, Contract, § 87.

² *Allen v. Harris*, 1 Ld. Raym. 122; *Russell v. Lytle*, 6 Wend. 390; *Harbor v. Morgan*, 4 Ind. 158; *Kromer v. Heim*, 75 N. Y. 574.

³ *Yates v. Valentine*, 71 Ill. 643, 644; *Moorhouse v. Second Natl. Bk.*, 98 N. Y. 503, 509.

⁴ *Simmons v. Clark*, 56 Ill. 96.

⁵ *Cumber v. Wane*, 1 Str. 425; *Beaumont v. Greathead*, 2 C. B. 494. See *supra*, p. 99.

In *Fuller v. Kemp*¹ a physician rendered his bill for \$670, suggesting that he hoped the defendant would regard this amount as just to both parties. The defendant sent his check for \$400 which he stated to be "in full satisfaction." This check was retained, and a new bill rendered for the original amount and a credit on account for \$400. The Court held this to be an accord and satisfaction, quoting with approval the following extract from *Preston v. Grant*:²

"To constitute an accord and satisfaction, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it, he takes it subject to such condition. When a tender, or offer, is thus made, the party to whom it is made has no alternative but to refuse it or accept it upon such condition. If he takes it, his claim is cancelled, and no protest, declaration or denial of his, so long as the condition is insisted upon, can vary the result."

An accord and satisfaction made with a third person has been held to extinguish the claim against the original party.³

Novation should not be confused with accord and satisfaction. This is a new contract which is substituted for the original before its breach, while accord and satisfaction occurs only after breach.

¹ 138 N. Y. 231. See also *Nassoioy v. Tomlinson*, 148 N. Y. 326; *Hull v. Johnson*, 22 R. I. 66. But see *Day v. McLea*, 22 Q. B. D. 610.

² 34 Vt. 201.

³ *Jackson v. Penn. R. R. Co.*, 66 N. J. L. 319; *Leavitt v. Morrow*, 6 Ohio St. 71.

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